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RECORD, CASE No. 14,056.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 119.

THE SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

vs.

ISABELLA SELEY, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. SELEY, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED JUNE 14, 1890.

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No. 48.

In the Supreme Court of Utah Territory.

ISABELLA SELEY, as Administratrix, etc., Plaintiff and Respondent,
vs.
THE SOUTHERN PACIFIC COMPANY, a Corporation, Defendant and Appellant.

Transcript.

Messrs. Marshall & Royle, attorneys for defendant and appellant.
E. M. Allison, Jr., and Kimball & White, attorneys for plaintiff and respondent.

(Marked) filed July 3rd, 1889.

WM. J. CLARKE, *Clerk*,
By JOS. P. BACHE,
Deputy Clerk.

1 Territory of Utah, in the District Court for the First Judicial District.

ISABELLA SELEY, as Administratrix of the Estate of William H. Seley, Deceased, Plaintiff,
vs.
THE SOUTHERN PACIFIC COMPANY, a Corporation, Defendant.

Complaint.

The plaintiff as administratrix aforesaid complains of defendant and alleges,

First. That the defendant now is, and at all times hereinafter mentioned was a corporation duly incorporated, organized and existing under and pursuant to the laws of the State of Kentucky, and now controls and is engaged in, and at all times hereinafter mentioned, was controlling and engaged in operating and running a certain railroad known as the Central Pacific railroad, running and extending from the city of Ogden in the county of Weber, and Territory of Utah, into and through the State of Nevada, and terminating in the State of California, together with the tracks, cars, locomotives and other appurtenances thereunto belonging;

2 Second. That the town of Wells, in the county of Elko, and State of Nevada, is, and was at the time of the injury hereinafter mentioned, a station through which the aforesaid Central Pacific railroad passed and at which was located, constructed, controlled and operated by the aforesaid defendant, a yard in which was numerous switches, frogs, side tracks and other appurtenances used for the purpose of switching, arranging and training the cars of the aforesaid defendant;

Third. That for a long time before, and on the 7th day of July A. D., 1887, the aforesaid William H. Seley, deceased, was employed and hired by the defendant as a conductor upon one of its freight trains, and on said 7th day of July A. D., 1887, was acting as and discharging the duties of such conductor;

Fourth. That on the said 7th day of July A. D., 1887, one of the frogs at, and near, a certain switch in the aforesaid yard, at the said town of Wells, was imperfectly, carelessly, negligently and inadequately constructed, guarded and protected, defective and unsafe, and dangerous to the employé, he using due and ordinary care; that said frog being so as aforesaid imperfectly, carelessly, negligently and inadequately constructed, guarded and protected, defective and unsafe, was, at the time aforesaid, and for a long time prior thereto, well known to said defendant;

Fifth. That on the said 7th day of July A. D., 1887, and while the said William H. Seley, deceased, was engaged in the per-
3 formance of his duties and occupation of conductor as aforesaid his foot became securely fastened and entrapped in the aforesaid frog by reason of the imperfection, defectiveness and unsafeness thereof, and by reason of its being carelessly, negligently and inadequately, guarded and protected and without any negligence or fault on the part of the said William H. Seley, deceased, by reason whereof said William H. Seley, deceased, was forcibly and violently struck by the cars of said defendant and thrown upon the ground, and there crushed and killed by said cars;

Sixth. That said William H. Seley left the plaintiff his widow, him surviving, and Hattie J. Seley, aged fourteen years; William G. Seley aged nine years, and John W. Seley aged three years, his only children and next of kin, who were entirely dependent upon him for support and said children were dependent upon him for nurture and education, also;

Seventh. That said William H. Seley died intestate, and on the 31st day of March A. D. 1888, this plaintiff was duly appointed and qualified as administratrix of the estate of the said William H. Seley, deceased, and letters of administration on the said estate were duly issued and granted to her by the probate court of Weber county, in the Territory of Utah, said William H. Seley being a resident of said county and Territory at the time of his death as aforesaid, and leaving estate therein;

Eighth. That by reason of the premises the plaintiff as
4 such administratrix has sustained damage in the sum of twenty-five thousand dollars; wherefore plaintiff demands judgment for the sum of twenty-five thousand dollars and for costs of suit.

EMERSON & ALLISON,
Attorneys for Plaintiff.

TERRITORY OF UTAH, } ss:
County of Weber, }

Isabella Seley, being duly sworn deposes and says, I am the plaintiff above named; I have heard read the foregoing complaint, and

know the contents thereof, and the same is true of my own knowledge except as to those matters therein stated on information and belief, and as to those matters I believe it to be true.

ISABELLA SELEY.

Subscribed and sworn to before me this 5th day of May A. D. 1888.

[SEAL.] P. H. EMERSON,
Notary Public, Weber County, Utah.

(Endorsed:) Complaint filed May 8th, 1888. H. H. Henderson, clerk, by A. H. Drake, deputy clerk.

(Title of the Court and Cause.)

Amendment to Complaint.

That the law of the State of Nevada now is, and at all the times herein stated, was as follows, as plaintiff is informed and believes and so charges the facts to be to wit:

5 "3898, SECTION 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the persons who, or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and, although the death shall have been caused under such circumstances as amount in law to a felony.

3899, SECTION 2. The proceeds of any judgment obtained in any action brought under the provisions of this act shall not be liable for any debt of the deceased; provided he or she shall have left a husband, wife, child, father, mother, brother, sister or child, or children of a deceased child, but shall be distributed as follows:

First. If there be a surviving husband or wife and no child, then to such husband or wife, if there be a surviving husband or wife, and a child or children or grandchildren, then equally to each, the grandchild or children taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or children, then to such child or children and grandchild or children by right of representation; if there be no child or grandchild, then to a surviving brother or sister or brothers or sisters, if there be any; if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons. Provided, every such action shall be brought by and in the name of the personal representative or representatives of such deceased person; and provided further, the jury in every

6 such action may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into

consideration the pecuniary injury resulting from such death to the kindred as herein named."

EMERSON & ALLISON,
KIMBALL & WHITE,
Attorneys for Plaintiff.

TERRITORY OF UTAH, } ss:
County of Weber, }

Isabella Seley being duly sworn, deposes and says: I am the plaintiff in above-entitled action, I have heard read the foregoing amendment and know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated on information and belief, and as to those matters I believe it to be true.

ISABELLA SELEY.

Subscribed and sworn to before me this 4th day of March, A. D. 1889.

[SEAL.]

H. H. HENDERSON, *Clerk*,
By A. H. DRAKE, *Deputy Clerk.*

Filed March 4th, 1889.

H. H. HENDERSON, *Clerk.*

(Title of the Court and Cause.)

Stipulation.

It is hereby stipulated that the above-named defendant shall have twenty days from this date to plead to the complaint herein.

May 21st, 1888.

EMERSON & ALLISON,
Attorneys for Plaintiff.
——— ———,
Attorneys for Defendant.

Filed May 21st, 1888.

H. H. HENDERSON, *Clerk.*

(Title of the Court and Cause.)

Answer of Defendant.

Now comes said defendant in the above-entitled action and makes this its answer to the complaint in said action. For a first defense, defendant denies that on or about said 7th day of July, A. D. 1887, said frog, which was situated near a certain switch in said yard at said town of Wells, mentioned in said complaint, was imperfectly, carelessly, negligently, or inadequately constructed, guarded or protected, or defective; or unsafe or dangerous to said employé, William H. Seley, in his said employment as conductor upon said freight train, or to him as such conductor, or to any other employé of defendant in its said business, he or they using due or ordinary care;

or that using due or ordinary care in the premises, said frog was at that time or prior thereto, well known or at all known to defendant to be imperfectly, carelessly, negligently or inadequately con-
8 structed, guarded or protected, defective or unsafe; or that it was then or at any time known to defendant to be defective, dangerous or unsafe to said William H. Seley as conductor as aforesaid, or to any other conductor on said road. And defendant denies that on or about said 7th of July, while said William H. Seley was engaged in the performance of his duties or occupation as conductor of said freight train, his foot became securely or at all fastened or entrapped in said frog, whether the same was or was not defective, dangerous or unsafe; or that by reason of the imperfections, defectiveness or unsafeness of said frog, or of its being carelessly, negligently or inadequately guarded or protected at said date or any date, the foot of said William H. Seley became, or without any fault or negligence on his part became securely or otherwise fastened or entrapped in said frog, or that by reason thereof said William H. Seley was forcibly or violently struck by the cars of said defendant, or thrown upon the ground, or there crushed or killed by said cars. Defendant further denies that by reason of any premises stated in said complaint, said plaintiff has sustained damage in the sum of $25,000.00 or in any sum whatever.

Second. And for a second and separate defense, defendant alleges: That on the said 7th day of July, A. D. 1887, and a few minutes prior to the death of said William H. Seley, he was acting as, and was, the conductor of said freight train, and employed as such conductor by defendant, but that in violation of his duty to defend-
9 ant as such conductor, and out of the line of his employment and duty as such conductor, said Seley with full knowledge of the construction, condition and danger—if any—of said frog, and being also at the time warned and cautioned against stepping on said frog, recklessly and wilfully, and without any care or diligence, and whilst the train was in motion, attempted to couple two cars in said freight train, by stepping in between the cars and moving with them; and that in so doing and by his own reckless and culpable negligence, he was caught and thrown down and killed, before the train could be stopped, although the train was stopped with great promptness; which is the same trespass and damage complained of by plaintiff.

Third. And for a third and seperate defense, said defendant denies that said death of said William H. Seley, deceased, was caused by the wrongful act or neglect of this defendant, or by any person employed by defendant and for whose conduct in the premises defendant was responsible; but on the contrary defendant alleges that said death was caused by the carelessness, negligence and misconduct of said William H. Seley, and by his disobeying the rules and instructions of defendant given him for his guidance in his employment by defendant, and by his departing from his duty and line of employment as a conductor upon a train of said defendant.

MARSHALL & ROYLE,
Attorneys for Defendant.

TERRITORY OF UTAH,
County of Salt Lake, } ss:

Thomas Marshall having been first duly sworn upon his
10 oath says, I am one of the attorneys for said defendant in the above-entitled action. I have read the foregoing answer and know the contents thereof, and that the same is true of my own knowledge, except as to the matters which are therein stated on information and belief, and that as to those matters I believe it to be true. My knowledge, information and belief are derived from my having charge as attorney for defendant of the defense to said claim of plaintiff, and from facts disclosed to me by plaintiff and defendant. That this verification is made by me because no officer of said defendant is, or is to be found in said counties of Weber and Salt Lake, this said county of Salt Lake being the county where I reside.

THOMAS MARSHALL.

Subscribed and sworn to before me, the undersigned notary public at my office in said county of Salt Lake on this the 6th day of June, A. D. 1888, as witness my name and my official seal hereto attached.

HARRY S. DUKE,
Notary Public.

[SEAL.]

Filed June 8th, 1888.

H. H. HENDERSON, *Clerk,*
By A. H. DRAKE, *Deputy Clerk.*

A copy of the within served on us on this the 8th day of June, A. D. 1888.

EMERSON & ALLISON,
Attorneys for Plaintiff.

11 (Title of the Court and Cause.)

Judgment on Verdict.

This action came on regularly for trial. The said parties appeared by their attorneys, Messrs. J. N. Kimball and E. M. Allison, counsel for plaintiff, and Messrs. Marshall & Boyle, for defendant. A jury of twelve persons was regularly empanelled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and being called, answered to their names, and on their oaths say: "We, the jury empanelled in the above-entitled action find the issues joined therein in favor of the plaintiff and against the defendant and assess the plaintiff's damages at $7,200.

RICHARD DYE, *Foreman.*"

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed, that said plaintiff do

have and recover from said defendant the sum of seven thousand and two hundred dollars and her costs and disbursements incurred in this action, amounting to the sum of one hundred and seven dollars and twenty-five cents.

Judgment recorded the 6th day of March, A. D. 1889, Book A, page 433.

Filed and entered March 6th, 1889.

H. H. HENDERSON, *Clerk.*

12 (Title of the Court and Cause.)

Order Extending Time.

On consent of counsel in open court it is ordered that defendant be, and it is hereby granted, ninety days from this date in which to prepare, serve and file statement on motion for a new trial.

Done in open court March 7th, 1889.

H. P. HENDERSON, *Judge.*

(Title of the Court and Cause.)

Notice of Intention to Move for New Trial.

To above-named plaintiff and Emerson & Allison and James N. Kimball her attorneys:

Take notice that defendant, Southern Pacific Company, intends to move the court to vacate and set aside the verdict in the above cause, and to grant a new trial of said cause upon the following grounds:

First. Insufficiency of the evidence to justify the verdict and the same is against law.

Second. Error in law occurring at the trial and excepted to by the defendant.

The said motion will be made upon a statement of the case hereafter to be prepared.

MARSHALL & ROYLE,
Attorneys for Defendant.

13 Copy served on us this 24th day of April, 1889.

E. M. ALLISON, JR.,
KIMBALL & WHITE,
Attorneys for Defendant.

Filed April 24th, 1889.

H. H. HENDERSON, *Clerk.*

In the District Court of the First Judicial District, Territory of Utah, County of Weber.

ISABELLA SELEY, as Administratrix of the Estate of William H. Seley, Deceased, Plaintiff,
vs.
SOUTHERN PACIFIC COMPANY, Defendant.

Statement on Motion of the Defendant for a New Trial.

It was stipulated in open court by the respective attorneys herein, that the statement on motion for a new trial herein and assignment of errors therein shall constitute the statement on appeal and assignment of errors therein.

The above cause came on to be heard at the term thereof before the Honorable H. P. Henderson, judge thereof, and a jury on March 4th, 1889.

The plaintiff appeared, by Messrs. Allison & Kimball, her
14 attorneys, and the defendant by Messrs. Marshall & Royle, its attorneys, and thereupon the following testimony was introduced; proceedings had and exceptions taken, to wit:

THOMAS E. HARDY, called for the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. ALLISON:

Q. Where do you reside?
A. Promontory.
Q. Where is that?
A. Utah, Box Elder county.
Q. How long have you lived there?
A. Pretty near a year and a half.
Q. What is your occupation?
A. Well, some call me conductor up there and some call me yard master. I have charge of those engines up there at the present time.
Q. For what company are you working?
A. Southern Pacific.
Q. How long have you been in the employ of that company?
A. Three years this coming fall.
Q. Were you in the employ of the Southern Pacific Company on the 7th day of July, 1887?
A. Yes, sir.
Q. And prior to that time?
A. Yes, sir.
Q. Were you acquainted with William H. Seley in his lifetime?
A. Yes, sir.
15 Q. Do you know whether he is alive now or not?
A. No, sir. He is not.
Q. You say that he is dead then?
A. Yes, sir.

Mr. MARSHALL: We admit that.

Q. How long had you known Mr. Seley prior to the time of his death?
A. Between six and seven months.
Q. What was the date of his death?
A. The 7th of July, 1887.
Q. Where did his death occur?
A. Wells, Nevada.
Q. Do — know what Mr. Seley's occupation was?
A. Yes, sir.
Q. What was it?
A. Conductor on a freight train.
Q. On what road?
A. Southern Pacific.
Q. Do you know how long he had been such conductor, prior to the time of his death?
A. No, sir. I couldn't tell you how long he had been.
Q. How long did you say you had known him?
A. Between six and seven months prior to the time of his death.
Q. What was his business during the six or seven months that you knew him?
A. Conductor.
Q. On the Southern Pacific railroad?
A. Yes, sir.
16 Q. State whether or not you worked with Mr. Seley.
A. Yes, sir. I did.
Q. In what capacity did you work?
A. As brakeman.
Q. On what train?
A. Freight train.
Q. On the Southern Pacific railroad?
A. Yes, sir.
Q. And that was the train of which Mr. Seley was conductor?
A. Yes, sir.
Q. Did you or did you not say you had worked on that train for six or seven months?
A. Not on that one train. On freight trains with him.
Q. Were you and Mr. Seley employed on that train on the 7th day of July, 1887?
A. Yes, sir.
Q. On the freight train?
A. Yes, sir.
Q. Where?
A. That morning we started from Carlin.
Q. Where is that?
A. Nevada. That was the end of a division then.
Q. What was your destination from Carlin?
A. Well, we run from Carlin to Terrace. That was one division an- from Terrace to Ogden was the other.
17 Q. You stated you were in Wells on that day?

A. Yes, sir.
Q Engaged in your employment on that train?
A. Yes, sir.
Q. Mr. Seley also?
A. Yes, sir.
Q. What time did you arrive in Wells on that day?
A. I couldn't tell you. It was between twelve and one o'clock, I think.
Q. In the daytime?
A. Yes, sir. In the middle of the day.
Q. After you arrived at Wells station what was done, Mr. Hardy?
A. We unloaded some way freight, and done some switching.
Q. What kind of switching?
A. Taking cars from one track to the main line, and putting some on another track.
Q. Putting cars in, your train?
A. Yes, sir.
Q. How long were you engaged in that switching that day?
A. I should judge it was half an hour, anyway. I think it was that.
Q. Who was in charge of this train at the time this switching was being done?
A. Well, Mr. Seley. We was all there. Mr. Seley and me and another brakeman.
Q. Who was in charge of the switching?
A. Mr. Seley.
18 Q. Was that done in making up the train?
A. Yes, sir.
Q. Now, Mr. Hardy, state whether or not there is a yard there at Wells.
A. Yes, there is a yard there.
Q. And how many tracks are there in addition to the main track?
A. Well, there's one goes into the coal shed, then there's four more beside that. Four or five, I wouldn't be sure which.
Q. The side tracks there are connected by a switch, are they not?
A. Yes, sir. There is a Y besides that too.
Q. State whether or not Mr. Seley assisted in switching upon that day.
A. Yes, sir, he did.
Q. In switching, arranging and training the cars is it necessary that a large amount of coupling has to be done?
A. Yes, sir, there is.
Q. Was there any coupling done that day in arranging that train?
A. Yes, sir.
Q. State whether or not Mr. Seley assisted in coupling and arranging those cars.
A. He did.
Q. Did he make or assist in making any more than one coupling that you know of on that day?
A. Yes, sir.

19 Q. How many times did he assist in making couplings on that day, or made couplings without assistance?

A. I think he made one or two before that.

Q. Do you know where he made or attempted to make the last coupling on that day?

A. Yes, sir.

Q. I wish you would show to the jury how those switches are arranged where the main line comes in from the east?

A. Well, the main line runs east and west through Wells. It was right on the main line where he was killed. There is a three-throw switch there and there were three frogs there.

Q. Will you explain what a three-throw switch is?

A. Well, I could figure it out on a piece of paper.

Q. Well, I show you a piece of paper, how is it on that?

A. Well, here is where the rails come together. Here is where the main line goes around there and goes through here. This one goes into the coal shed. There is one frog there. Another ought to be opposite that and one down here in the center.

Q. How many frogs are there there?

A. Three frogs. Two right opposite it and one right in the center.

Q. How far, Mr. Hardy, is the first frog located from the three-throw switch?

A. I think it is supposed to be thirty feet.

Q. How far are the other two from the first frog?

20 A. I couldn't tell you.

Q. About how far?

A. Well, I should judge about fifteen or twenty feet.

Q. So that you would place the first one about thirty feet from the three-throw switch and the other about fifty?

A. Yes, sir.

Q. I wish, with reference to those frogs you would locate the position of Mr. Seley—where was Mr. Seley standing when he attempted to make this last coupling with reference to these three frogs?

A. He was standing right in the frog. His one foot was in one of the frogs. When I first saw him he was on the outside.

Q. What were you doing then?

A. We were standing there.

Q. What were you doing when Mr. Seley was standing out to the side of the track?

A. I tried to make the coupling.

Q. How many times did you try to make that coupling?

A. Twice.

Q. You experienced some difficulty in making that coupling?

A. Yes, sir.

Q. What was the reason of that difficulty?

A. Because I had a small link and the link slipped back into the draw-head.

21 Q. How many times did you so endeavor to make it?

A. Twice.

Q. Did you make it?
A. No, sir.
Q. State if any other person beside yourself attempted to make it.
A. Yes, sir.
Q. Who did?
A. The other brakeman.
Q. Who was that?
A. I couldn't tell you his name. I have forgotten.
Q. He was braking on this same train under Mr. Seley?
A. Yes, sir.
Q. You say he attempted to make the coupling?
A. Yes, sir.
Q. Before or after you did?
A. I think it was after I did.
Q. How many times did he attempt to make it?
A. Once.
Q. After you had attempted to make the coupling the second time and failed, what did Mr. Seley do?
A. He said, "I believe I can make it."
Q. Did he make the attempt?
A. Yes, sir.
Q. When he made that remark what did you do?
A. I says, You can't make it with that link. I threw that
22 link away and got another one. He says, I can make it, and I stepped out to one side and he stepped in.
Q. Did he attempt to make the coupling?
A. Yes, sir.
Q. Did he make it?
A. No, sir.
Q. Do you know why he didn't?
A. The link slipped. The link slipped back the same as mine did.
Q. Did he attempt to make the coupling again?
A. Yes, sir. The first time the cars didn't come together. They was backing down and stopped and I run and changed the link after that. He tried to make the coupling with the short link I used. The cars were coming together and I told him he couldn't make it with that link, and then I went and changed the link.
Q. When he walked in how did he stand with reference to the draw-head of the car that was stationery?
A. He headed toward it—he headed west.
Q. Then the stationery car—he faced toward that?
A. Yes, sir.
—. Where was the remainder of the train to which the engine was coupled?
A. Headed east.
Q. You say they backed down and didn't come together. Did they back down a second time?
A. They had been backing down two or three times before that.
23 Q. Well, after Mr. Seley came up?

A. Once.
Q. Did he attempt to make the coupling then?
A. They didn't hit the first time at all. They come within about ten or twelve feet, I should judge, the first time. Then he went in and tried to make the coupling.
Q. Did he make the coupling?
A. No, sir.
Q. What did he do?
A. Got killed.
Q. Where was the link, in the car that was moving or the one that was stationary?
A. The car that was moving.
Q. How far were the cars apart then?
A. About ten or twelve feet.
Q. When he caught hold of the link, I mean.
A. Yes, sir. Just about to make the coupling.
Q. Where were you at this time?
A. I was standing at the side of the train.
Q. State if you were giving signals to the person on the engine.
A. I was.
Q. Who was on the engine?
A. A man by the name of Comte.
Q. Was it the engineer?
A. No, sir.
Q. Who was it?
A. The fireman.
24 Q. Where was the engineer?
A. At dinner.
Q. The fireman was doing the switching?
A. Yes, sir.
Q. You say he took hold of that link and walked down with the car?
—. No, sir.
Q. Then what occurred?
A. Well, he tried to make the coupling and his foot was in the frog and he got caught. The brake-beam catched him on the calf of the leg and threw him down.
Q. What part of his foot was caught in the frog?
A. The toe of his shoe.
Q. When he caught the toe of his shoe in the frog, you say he was killed right there?
A. Yes, sir.
Q. What was the cause of his death?
A. The wheel run up onto him.
Q. After he went in and took hold of that link, and before he was killed, did he move at all?
A. Yes, he was giving a signal this way to come back.
Q. Wasn't it the fact that he was walking toward the stationary car?
A. No, sir.
Q. Didn't he have to move at all?

A. No, sir. He was standing right up against the car as I might be that way. He didn't have to move at all.

25 Q. How is it?

A. He was standing by the stationary car, and when it got close enough he caught hold of the link and inserted the link into the other draw-head.

Q. You don't want to be understood to say that he took hold of the moving car and moved along with it?

A. No, sir; I said he didn't.

Q. He took hold of the link in the stationary car?

A. The link was in the moving car.

Q. But he stood there?

A. He stood by the car that was standing still; and when the other car came close enough he took hold of the link to put it into the other draw-head.

Q. It was then his foot caught in the frog?

—. ——.

Q. What was done immediately after his foot was caught in the frog, Mr. Hardy?

A. I hollered to the fireman to back up, and told him he'd killed Seley, and he pulled up and we took him out as quick as we could.

Q. How near were the cars together, Mr. Hardy, when Mr. Seley stepped in there to make that coupling?

A. Five or six feet, I should judge.

Q. When they came together did the stationary car move?

A. Just a little, yes.

Q. Did Mr. Seley move with it?

A. No, sir.

Q. Why?

A. The other car was on him.

26 Q. When they came together he caught his foot and couldn't move?

A. Certainly.

Q. Are you able to state, or not, whether this is the shoe Mr. Seley wore on that day?

A. It looks something like it. It was a button shoe.

Q. Did you assist in removing his foot from this frog?

A. I don't know as I removed his foot. I had hold of his body. I don't know as I had hold of his foot at all. I don't think I did.

Q. Who assisted you removing him from there?

A. Mr. Crosby, Mr. Peak and his fireman. There was some more around there. I couldn't say who they were.

Q. How long did it take you to remove his foot from the frog?

A. I don't know.

Q. His foot pretty securely fastened there?

A. Yes, pretty fast.

Q. What is the width of the frog?

A. I couldn't tell you.

Q. You can give us your judgement on that, can't you?

A. I should judge three or four inches.

Q. Did the death of Mr. Seley occur instantly?

A. Yes, sir.
Q. Do you know what was the age of Mr. Seley?
A. No, sir, I couldn't say.
27 Q. Do you know what compensation he was receiving?
WITNESS: The pay was $90.00, I believe, a month.
Q. Have you been in the employ of the railroad company for some time?
A. Yes, sir.
Q. How long have you been in the railroad business?
A. About six years.
Q. And how much of that time have you been engaged in the capacity of brakeman?
A. Nearly all of that time as brakeman or yardman.
Q. State whether or not it is the brakeman's duty to make couplings of cars.
A. Yes, sir.
Q. Now, in effecting the coupling of two cars together, where is the attention of the brakeman principally directed?
A. Well, when a man goes in to make a coupling, he naturally looks down and then he looks at the draw-head.
Q. When he is in the act of making a coupling where is his attention directed to principally?
A. To the draw-head.
Q. Suppose, as in the case of Mr. Seley, standing beside the stationary car and waiting the approach of the remainder of the train to which the engine was attached, wouldn't his attention be directed to the approaching train, naturally?
28 A. I don't know that it would, no. It is generally customary for brakemen to look behind them to see how far they are apart.
Q. They will naturally watch for the approaching train?
A. Yes, sir.
Q. State whether or not it is necessary to step between the cars to make the coupling.
A. He has to step in there to get close enough to the draw-head to make it.
Q. Was it necessary for Mr. Seley to do this upon that day, go between those cars to make it?
A. It couldn't have been made without he had gone in there.
Q. I'll ask you to state Mr. Hardy, what the condition of that frog was upon that day at the time Mr. Seley was killed.
A. All right as far as I know.
Q. Well, state whether or not it was an open or closed frog.
A. An open frog.
Q. What is the shape of a frog, Mr. Hardy?
A. Both ends kind of branch out that way and they come together in the center.
Q. But at the base of it there is a point.
A. Right in the center there is a point.
The COURT: A sharp V?
A. Yes, sir.

29 Mr. ALLISON: It consists of rails, doesn't it, projecting out?

A. Yes, sir.

Q. Now, between the two rails as they separate from the point isn't there an open space?

A. Yes, certainly.

Q. Was there in that frog on that day an open space?

A. Yes.

Q. State whether or not there was a block of any kind in there.

A. No, sir.

Q. How long had you worked in that yard, around that yard, at Wells?

A. I had been there about half an hour.

Q. I mean altogether in the employ of the company; I mean in the yard at Wells, so as to be familiar with it.

A. Six or seven months.

Q. Are you able to state or not whether that frog was blocked any of that time?

A. I couldn't say that.

Q. Did you ever see the frog before?

A. Why I never took any particular notice of it, only as I walked past there.

Q. Were any of the other frogs in the yard blocked?

A. Not as I know of.

Q. What difference would it have been if that frog had been blocked?

30 Mr. MARSHALL: We object.

Mr. ALLISON: What condition would it have made it if that frog had been blocked? You say you had been working about this yard in Wells for six or seven months.

A. Just running through there.

Q. Had you done considerable switching around there?

A. Done some, of course.

Q. You are familiar with the tracks, the main track and all the tracks at Wells?

A. Yes, sir.

Q. And the location of the frogs?

A. Yes, sir.

Q. State whether or not you know the difference between a frog that is blocked and one that is not blocked.

A. I suppose I would.

Q. Have you ever seen a frog blocked?

A. Yes, I saw one.

Q. I mean in the condition of being blocked, after it was blocked.

A. Yes, I saw it after it was blocked.

Q. So you know the difference between a blocked frog and one that is not blocked?

A. Yes.

Q. Well, what is the difference?

A. The only difference is that a man's foot can't get down in it when it is blocked.

Q. When it has been blocked can it get down in?

31 A. Not way down in, no.

Q. What would have been the difference, Mr. Hardy, upon this day if this frog had been blocked—what would have been the difference in the condition of the frog, if it had been blocked?

A. Well, instead of having been an open frog it would have been a blocked frog.

Q. You mean that if it had been blocked, all the space would have been filled up?

A. Yes.

The COURT: The point of the V would have been filled up?

A. Yes, sir.

Q. What difference would the blocking of the frog make to the safety of the employés who were working in that yard, if any?

A. Well, a man's foot couldn't get down in there, that's the only difference I see.

Q. The result would be that it would be safer?

A. I should think so, yes.

Cross-examination.

Examined by Mr. MARSHALL:

Q. Mr. Hardy, how long have you been a brakeman on the railroad?

32 A. Between five and six years.

Q. On what roads have you worked as brakeman?

A. Some on the Union Pacific, some on the Rio Grande Western and the Southern Pacific.

Q. How long have you worked on the Southern Pacific?

A. Between seven and eight months—I mean, about three years.

Q. Six or seven months prior to this accident?

A. Yes, sir.

Q. Was Mr. Seley working as conductor all of that time you was working as brakeman?

A. Yes.

Q. And some time previous to that?

A. I only know what I was told.

Q. While you was there he was working as conductor?

A. Yes, sir.

Q. For six or seven months?

A. Yes, sir.

Q. I understood you in your examination-in-chief to say that you were familiar with the track and switches of the Central Pacific road on the division on which you worked from Ogden to Carlin, that you had seen them frequently?

A. I've seen them—passed over the division.

Q. During the whole of that time did the Southern Pacific Company ever have blocked frogs on the general route from Ogden to Carlin?

33 A. Not as I know of.

Q. Did you ever see a blocked frog on that road during that time?

A. No, sir.

Q. Where did you ever see a blocked frog used outside of a town?

A. I never saw one outside of a town.

Q. Where did you ever see one used?

A. In Kansas.

Q. Any used on the Union Pacific system while you was there?

A. No, sir. I don't believe there was.

Q. Mr. Hardy, I understand from you that Mr. Seley was six or seven months on that road while you were with him—was a freight conductor on the Central Pacific road?

A. Yes, sir.

Q. What are the duties of a brakeman on the road, on the Southern Pacific road?

A. Well, to do the switching, do the coupling, putting on cars and cutting them out, picking them up.

Q. He is subordinate to the conductor and subject to his orders?

A. Yes, sir.

Q. The conductor is head officer and in control of the train?

A. Yes, sir.

Q. And he directs all his movements?

A. Yes, sir.

34 Q. Mr. Hardy, what are the duties of the conductor? Briefly state them.

A. Well, I couldn't tell you. Making out reports, running trains, getting orders, see the train is running on time, gets orders to pick up cars.

Q. Are not his duties to supervise the running of the train, and giving directions to other employés, engineer and brakeman?

A. Yes, sir.

Q. Is it his duty to couple cars or is it the duty of the brakeman to couple cars?

A. I suppose it's the brakeman's duty.

Q. The conductor is over the brakeman and it is the brakeman's duty to couple cars?

A. I suppose it would be.

Q. Mr. Hardy, I would ask you if the conductors on that line on the freight trains had opportunity to see the character of frogs used on the Southern Pacific system—whether during those six or seven months if he had used his head he could see the character of frogs and switches used on that line?

A. Yes, sir.

Q. Wasn't it absolutely certain that he could see them and did see them?

Mr. ALLISON: We object to this witness testifying what is absolutely certain some other man might know.

The COURT: Ask him for his opinion.

Mr. MARSHALL: I'll ask you if in your opinion any conductor or brakeman with eyes in his head could see that the open frog was universally used on the Southern Pacific line.

35 A. Yes, sir. I knew it. I've noticed it right along.

Q. Mr. Hardy, are you familiar with the rules and regulations of the Southern Pacific Company issued to brakemen?

A. Yes, sir.

Q. They are given to all its officers?

A. They are on the back of the time-card and you are issued a time-card as soon as you go to work.

Q. And they are given to brakemen—all brakemen?

A. Yes, sir.

Q. Mr. Hardy, I hand you a paper and call your attention to it, please state to the court and jury what that is.

A. Southern Pacific time-card.

Q. What is on the back of that?

A. Well, there are the rules of the road, running rules.

Q. For conductors and brakemen, are they not?

A. Yes, sir.

Q. Please turn to the rule for the instructions to its brakemen.

Mr. MARSHALL: We object, not cross-examination.

The COURT: I'm inclined to think they would have the right to object to that.

Mr. MARSHALL: I'll recall that question. Mr. Hardy, you said in your examination-in-chief that you and the other brakeman, was his name Griswold?

A. I couldn't state what his name was.

36 Q. R. E. Griswold?

A. It appears to me that was the name.

Q. You and the other brakeman tried to make this coupling several times and failed, owing to the link being too small, was that the reason?

A. It was too short. It slipped back in the draw-head.

Q. Well, I understood you to say in your examination-in-chief that Seley came up and said he could make the coupling, and stepped in between the cars and endeavored to make it with the small link first and after your speaking to him, desisted and you went and got a larger link and gave him?

A. I took the link out and put a longer one in.

Q. Mr. Hardy, do you remember any remark that *that* you made to Mr. Seley warning him relative to the frog, to look out for the frog?

A. Yes, sir.

Q. You remember that remark?

A. Yes, sir.

Q. Do you remember what the language was that you used to put him on his guard?

A. I couldn't say the words. I says: "For God sake, Seley, get your foot out of the frog or you'll get ketched."

Q. What did he do when you mentioned it—did he have his foot in the frog at that time you called to him?

A. Yes, sir.

37 Q. He left it in?

A. He took it out and stepped outside of the track.

Q. Did he put it in again?

A. He did when he went in the second time.

Q. You had warned him once to look out for the frog?

A. Yes.

Q. Then he knew the frog was there, did he?

A. I suppose he did from that; yes.

Q. Do you remember anything Griswold called his attention to at that time?

A. No, sir; because he was on the other side of the cars.

Q. Who was it ordered the acting engineer to back back to the car?

A. I did.

Q. Did you do it by instructions of your superior?

A. Yes, sir. I was acting under his instructions. He says, "Back 'em up, Tom."

Q. Mr. Hardy, I want to ask you another question and I want you to refresh your recollection about this, because I want you to see that you agree with other witnesses.

Mr. KIMBALL: I submit that is not the proper manner of questioning.

Mr. MARSHALL: Mr. Hardy, was Mr. Seley standing still with his foot in the frog at the time the train struck him or was he moving?

38 A. He was standing still.

Q. He was standing still when the car struck him?

A. Yes, sir.

Q. And by his order you beckoned to the engineer, and the engine with the other cars attached backed back to where he was standing by the side of the stationary car?

A. Yes, sir.

Q. And he extended his hand to the link that was hanging at the draw-head—he extended his hand to take hold of the link to insert it in the draw-head of the car that was standing still?

A. Yes, sir.

Q. And his foot was in—must have been in the frog at that time?

A. Yes.

Q. You don't know of your own knowledge how much longer prior to the time you went to work there Mr. Seley had worked for the company, do you?

A. No, sir.

Q. Was he working the whole of the six or seven months on that division as conductor?

A. He might have laid off some, but that was his place.

Q. As such conductor how often would he have to pass through this yard at Humbolt Wells?

A. Sometimes we'd be turned around and have to go through there every day for two or three days and then not for a week.

39 Q. Almost every week he was through the same yard?

A. Yes, of course.

Q. Mr. Hardy, how long had the regular engineer—I understood you to say only the fireman was tending the engine at the time this accident took place?

A. Yes, sir.

Q. Where was the engineer?

A. To dinner.

Q. Did the conductor instruct the fireman to take charge of this engine?

A. No, not as I know of. I didn't hear him say anything to the fireman.

Q. Is it the fireman's business to handle an engine in the absence of the engineer?

A. I don't know anything about this department.

Q. Who ordered the fireman to move that train from where the engineer left it?

A. I told the man this way—I told the man running the engine to pull down to do some switching at the lower end of the track.

Q. Where was Mr. Seley—did he hear that?

A. Yes. He was back of me a few feet.

Q. He heard you— did he hear you give the order?

A. I suppose he could.

Q. He made no dissent to it?

A. He didn't say anything about it.

—. ——.

A. He said he'd go down with me.

Q. Do you know anything about whether Mr. Seley knew the engineer was at dinner?

40 A. I couldn't tell you anything about that at all—I don't know.

Redirect Examination.

Examined by Mr. KIMBALL:

Q. Do you know whether Mr. Seley knew anything about who was on the engine at that time?

A. No.

Q. You yourself knew the fireman was on the engine?

A. Yes.

Q. You told him to pull down, you wanted to do some switching?

A. Yes.

Q. Which side of the train was you on?

A. We was on the side that the firemen sits on—no, I was on the side that the engineer sits on.

Q. You knew that it was the fireman was there?

A. Yes, sir.

Q. You ordered him to go down?

A. Yes.

Q. You don't know that Seley knew who you were talking to or not?

A. I couldn't say I do.

Q. This station, Humbolt Wells, that's the station that's called Wells, isn't it?

A. Yes, sir.

41 Q. That's the end of a division, ain't it?

A. It is now, it wasn't then.

Q. There was a round-house there?

A. Yes, sir.

Q. And engines kept there?

A. Yes, sir.

Q. Were there several switches in that yard?

A. O, yes.

Q. More than two switches there?

A. Yes, there are four or five there.

Q. And you had more or less work to do in that yard every time you went in there didn't you?

A. Yes, sir.

Q. And at the point where this coupling was done is at a point where there is a three-throw switch?

A. Yes, sir.

Q. Now, you had been in that yard before, hadn't you, before that time?

A. Yes, sir.

Q. How long had you been there that day trying to make that coupling, that Seley tried to make?

A. I guess we had been there five or ten minutes. I tried to make it twice.

Q. Did the other brakeman try to make that coupling?

A. Yes, sir. Once. He was on the opposite side from me.

Q. And he failed, did he?

A. Yes, sir.

42 Q. And the conductor was out at that time giving the signals as you were attempting to make the coupling?

A. I couldn't swear whether he was or not. I had my hand out.

Q. Well, the other brakeman had failed once and you had failed twice to make that coupling before Mr. Seley undertook to make it?

A. Yes, sir. After I had failed to make it the second time he said he thought he'd try it.

Q. He went between the cars and you told him he couldn't make it with that link?

A. Yes.

Q. And you changed the link?

Mr. MARSHALL: I object to that style of question. Rather too leading with his own witness.

The COURT: Mr. Kimball, that is leading.

Mr. KIMBALL: State whether or not Mr. Seley had been between the cars before the time he went between them at which he was killed.

A. Yes, he went in there once before and stepped out again. I hollered at him.

Q. What did you holloo at him?

A. I told him to get his foot out of the frog or he would get ketched.

Q. That was the first time he went in there?

A. Yes.

Q. When he came out where did he stand?

A. Just out at the side of the track.

Q. Which way was he looking?

43. A. I couldn't tell you. I think right straight at the cars.

Q. Now, how near do you say those cars were together at the time he stepped in at the time at which he was killed?

A. Must have been five or six feet.

Q. When he stepped between the cars?

A. Yes. They was moving back at the time.

Mr. MARSHALL: This has all been over once. I can't see the use of it.

The COURT: This is preliminary I suppose.

Mr. KIMBALL: You fellows had been there and lost considerable time trying that coupling before Seley undertook it?

A. Yes.

Q. Your train was getting behind time?

A. Yes.

Mr. ROYLE: That is rather leading.

Mr. KIMBALL: You may state whether or not you hadn't lost considerable time.

A. We come in there late and doing that switching we lost more.

Q. I understand you to say that the conductor was in charge of the train?

A. He was.

Q. State what if anything you know about it being an unusual thing for the conductor to make a coupling.

A. I've seen other conductors make couplings.

44 Q. State whether or not it isn't the usual thing for conductors to do that on that road.

A. Well, if they see—say for instance they stand opposite where a coupling is to be made, and there ain't any brakeman near they'll step out and make the coupling.

Q. How is it when they see the brakeman is having difficulty?

A. They go out and help.

Q. How long after you had told Seley to be careful, that he stepped in there the second time?

A. Probably five minutes, something like that.
Q. Did he step in at the same place?
A. Yes. At the same place—at the same frog.
Q. That was the same spot that you tried to make the coupling?
A. No, it was up above. Every time it hit it it went down a little.
Q. Well, state whether the cars came together after you told Seley to come out, and he did come out.
A. No, sir.
Q. You stated that you knew of no frogs on the Southern Pacific—no blocked frogs on the Southern Pacific railroad?
A. I don't know of any, no.
Q. Well, what if anything, do you know about the Union Pacific?
A. I don't know anything about the Union Pacific.
Q. How many years ago since you knew about it?
45 A. Some four or five years.
Q. What, if anything, do you, as a railroad man, know about railroads as a custom, using the blocked or unblocked frog?
A. I don't know anything about it at all.

Recross-examination.

Examined by Mr. MARSHALL:

Q. Do I understand you to say that one of the duties of a conductor is to couple cars? I'll ask you if it is one of the duties of a conductor to couple cars?
A. No, sir. I don't want you to understand me that way. I said he sometimes does it.
Q. Under certain circumstances?
A. Yes.
Q. If he sees a brakeman running down to do it, he will sometimes do it?
A. Yes.
Q. That is not really his duty?
A. Not as I know of.
Q. From your experience you ought to know.

46 *Redirect Examination.*

Examined by Mr. KIMBALL:

Q. I didn't understand you to say—or did I understand you to say what part of his foot was caught in the frog?
A. The toe—the point of his foot.
Q. You are quite certain of that?
A. Yes, he was headed west, and his toe caught in the point of the frog.

T. E. HARDY, recalled by the plaintiff, testified as follows:

Examined by Mr. KIMBALL:

Q. Mr. Hardy, you look at this plat (a copy of which is hereunto attached: Reporter)

(Here follows diagram marked p. 46*a*.)

which represents the lay of the tracks at Wells, this is where the switch stands, and that is the first frog and these are the other two switch frogs in that yard. Now, this is east, that west, that north and that south, will you explain to the jury where the stationary car stood with reference to these frogs, and which frog it was that he got caught in?

A. Right about in there. That lower frog is the one he got caught in.

Q. The balance of the train stood out here?

A. Yes, sir. They stood out here.

Q. This one and that one represent the rails of the main line and these two represent the rails of the lower switch.

47 A. Yes, sir. They go on to the turn-table. Those two are the other switch and the car that was backing down stood up here on the main line.

Q. You were backing up that way?

A. Yes.

Q. Where did Mr. Seley stand?

A. His foot was about in there. When we picked him up his body was right on the point of the frog.

Q. How long had you been out on the road at the time of the accident?

A. I couldn't tell you how long we had been out on that trip. Must have been two days, anyway, because it takes two days, but I couldn't say. We might have been out a week for all that I know.

Q. What was the name of the other brakeman on that train?

A. I couldn't tell you his name. He hadn't been on the road long at that time. I hadn't seen him before he came on that trip.

Q. State whether or not he had been out on the road with you before.

A. Yes.

Q. How many times?

A. Either one or two times.

Q. Where is he now, do you know?

A. No sir, I do not.

Q. What experience had he had, if any, if railroading before, if you know?

Mr. MARSHALL: What is the object?

48 Mr. KIMBALL: I expect to show that both Mr. Seley and Mr. Hardy had made complaint at the superintendent's office that he was an incompetent brakeman.

Mr. MARSHALL: I don't see how that is material.

The COURT: Do you offer it as having a tendency to show why the conductor undertook to make the coupling?

Mr. KIMBALL: I think it bears upon the question.

The COURT: You don't offer it as substantive negligence?

Mr. KIMBALL: No sir. Only as bearing upon whether, under the circumstances, it was within the scope of the conductor's duty to make that coupling.

The COURT: You make take the testimony.

Mr. MARSHALL: We wish an exception entered.

WITNESS: That I don't know. I couldn't tell what experience he had. He claimed to be an old man. That's all I know about it.

Q. How many trips did you say he had made with you prior to this trip?

A. Either one or two, might have been three.

Q. What, if anything, do you know about complaints being made to the chief dispatcher about this brakeman either by yourself or Mr. Seley?

A. I hadn't made any myself, but I made them to Mr. Seley.

Q. What, if anything, do you know about his making any complaints to the chief dispatcher?

A. He told me——

Mr. MARSHALL: Never mind what he told you.

49 Mr. KIMBALL: No, I don't ask what he told you. Do you know whether he went to the dispatcher or not?

A. No, sir, I do not.

Q. You say you complained to Seley?

A. Yes, I complained to the conductor.

Q. What was the nature of your complaint to the conductor?

A. I told him I didn't think the man was a good man. I didn't propose to do all the work.

Q. In what way wasn't he a good man?

A. Well, he was slow and always out of place. I was breaking behind, but if there was anything to do ahead, ten chances to one I would have to get out and do it.

Q. Did you complain to Mr. Seley more than once?

A. I don't know. I believe I did. *A.* I think I told him twice about it. Once before that.

Q. You don't really know whether Mr. Seley really did go in pursuance of that or not?

A. No, sir.

Cross-examination.

Examined by Mr. MARSHALL:

Q. How long before this accident was it that you complained to Mr. Seley?

A. It was a trip before the last one.

50 Q. How many days was that before?

A. I couldn't tell you. I don't know how many days we was out on the road before the accident.

Q. What did you complain of, his incompetence or his idleness?

A. I complained he was lazy. He seemed to get around and do his work. I would have to go and get the engine.

Q. You didn't complain he didn't know how to do it?

A. No, I didn't say anything about that, because he had done it before.

Redirect Examination.

Examined by Mr. KIMBALL:

Q. You regard a lazy man as incompetent, don't you?

Mr. MARSHALL: I object to that.

The COURT: Well, he has stated the facts.

SAMUEL YOMANS, called for the plaintiff, being duly sworn, testified as follows:

Examined by Mr. ALLISON:

Q. Where do you reside, Mr. Yomans?

A. Echo.

Q. What county?

A. Summit.

51 Q. This Territory?

A. Yes, sir.

Q. What is your occupation?

A. Assistant road master, Union Pacific railroad.

Q. How long have you been in that occupation?

A. Nearly four years.

Q. What had been your business prior to that time?

A. Section foreman on the Union Pacific road.

Q. How long were you section foreman on the Union Pacific?

A. Fourteen years.

Q. Then you have been in the employ of the Union Pacific for nearly nineteen years?

A. Yes, sir, nearly so.

Q. Over what portion of the Union Pacific line do your duties at present extend?

A. From Ogden to Park City.

Q. Are you familiar with the construction and laying of tracks, frogs, switches?

A. Yes, sir.

Q. Are you able to state the difference between a blocked and unblocked frog?

A. Yes, sir, I think so.

Q. I'll ask — to state the construction of a frog—explain to the jury upon that diagram there, if you can.

A. Well, that is what we call a three-throw switch, a drawing of it. Here is one frog; here is one frog here, and further back here

are two more opposite each other. They are usually placed
52 about thirty feet. I think this portion here is drawn a little too long comparatively, I think. This second frog is usually placed about thirty feet. These two back frogs are opposite each other usually, always opposite when the leads are the same. Sometimes this lead is a little shorter than the other and then this one is back a little further, but here they both turn off the same. I should think that represented a plated frog. That's a frog made with a place for an iron place on the bottom and riveted through. There are a great many different kind of frogs. By the drawing I should think this represented a plated frog, a steel rail with a plate on the bottom.

Q. State to the jury how close the rails come together at the base of the frog?

A. Well, about two inches or three.

Q. Now, what is the shape of the top of the rail?

A. It's kind of oval—round.

Q. What do you call the top of the rail?

A. The ball.

Q. State whether that projects over farther than the middle of the rail?

A. Yes, sir. The rail is made up the shape of a P.

Q. Are you able to state the difference between a blocked and an unblocked frog?

A. Well, I don't know as I understand you.

Q. In the construction of the frog, what is the difference?

53 A. Well, I should take this to represent not a blocked frog. Then there is another term you might call blocking a frog. That is putting in safety blocks after the frog is laid. The blocked frog is right in between the rails, and then there is a block goes in which forms a part of the frog, and is bolted right through. I should judge that frog is a plated frog, long in between the rails from the bottom to the top. Then the safety block we fit in between the rails. It depends on the angle of the frog and the size of the block. It is usual on the Union Pacific to be within two and three feet. The block goes in between the flange and the ball of the rail in the narrow space, from two to three feet, and also here. These frogs would be the same. In a three-throw switch it takes eighteen blocks to complete the blocking of a switch. In the single throw it takes eight.

Q. Of what do the blocks usually consist?

A. Wood. Usually pine.

Q. What is the result of blocking a frog?

A. It makes it more safe for the yardmen—the men around the yard switching.

Q. In what way?

A. Well, it takes up part of the spaces where their feet is liable to ketch. That's what the blocks are placed there for.

Q. You say that is the object of blocking the frog, safety to the employés?

A. Yes, sir.

Q. How long have you known the use of the safety block in blocking frogs, Mr. Yomans?

54 A. I couldn't say. I seen some a good while ago. Might be ten, might be twelve years.

Q. You think you are safe in saying you have known of their use for more than ten years?

Q. Yes, sir, that is, more or less.

Mr. ALLISON: What are the duties of a road master?

A. I've got the rules in my pocket if you want to see them.

Q. State them.

A. We have charge of the track in our jurisdiction. See that everything is in good repair, switches, grades, the track in general. Also to see to the yards, see they are kept clean, in good shape, and so forth.

Q. Is it within the duties of a road master to see that the tracks, side tracks in the yard and also the main track are kept in proper repair?

A. Yes, sir.

Q. And in a safe condition?

A. Yes, sir.

Q. Now, if you will answer that question, how long of your own knowledge it has been the general knowledge of railroad men, that blocking a frog contributes to the safety of the employé?

A. Well, I said before I couldn't say. I suppose I may have seen blocking done and heard of its being done ten or twelve years ago. I don't think I ever done any myself that far back.

Q. Have you ever supervised the construction of frogs wherein blocking was resorted to?

55 A. Yes, sir.

Q. When and where, and upon what road?

A. On the Union Pacific. At Echo, Park City and Ogden.

Q. In the yard?

A. Yes, sir.

Q. State whether or not it is the policy of the Union Pacific railroad to block its frogs.

A. That's our instructions.

Q. Your express instructions?

A. Yes, sir.

Q. Which frog, the blocked or the unblocked one, in your opinion is the safer to the employé?

A. The blocked frog, certainly.

Q. Why is it safer?

A. Well, you are less liable to get caught.

Q. In your opinion, if a frog is properly blocked, is it possible to have the foot caught?

A. It is in some frogs. With a blocked frog, properly blocked, I should think it was impossible. But all frogs ain't what we call blocked frogs.

Q. Well, what about the safety blocks?

A. A safety block will protect any frog where it is put in. In

the heel and point where the V comes together, at the point of the V.

Q. I understand you to say that the blocking was placed in the frog between the ball of the rail and the flange.

56 A. That's in a blocked frog, and not a frog blocked; it isn't a safety block. A safety block you can use them on any frog. All frogs are not blocked frogs. It's the construction of the frog that makes them blocked frogs. And then you can block any frog with safety blocks. As I said, it goes in these extreme ends and the block goes right through and becomes part of the frog. A blocked frog and a frog blocked are two different things, because you can block any frog and any frog ain't a blocked frog.

Q. Now, about the space between the ball of the rail and the flange of one.

A. Well, the blocked frog has got a block between the ball of the rail and the flange. I can also put safety blocks in the end of a blocked frog. That makes a comparatively safe frog.

Q. I'll ask you to state if it isn't more generally the custom of blocking frogs in the yard than on the main line.

A. Yes, sir. That is, the large yards, you mean?

Q. Yes, sir.

A. Yes, sir.

Cross-examination.

Examined by Mr. MARSHALL:

Q. Mr. Yoman, are there blocked frogs in the Ogden yard of the Union Pacific?

57 A. The frog blocked, yes.

Q. I'll ask you *if* whether that is used on the Union Pacific at Ogden. There are some blocks in, but the majority of the frogs are not blocked. That is the case, isn't it?

A. Yes, sir. There are some blocks in *in* Ogden, but the majority are not blocked.

Q. I desire to show you this work, are you familiar with that publication?

A. I have heard of it a good many times and seen the work, but I don't belong to the association.

Q. You'r- a road master yourself, are you not?

A. Assistant road master.

Q. Do you know how that is held among road masters as authoratative, or the actions of that convention, and the resolutions passed by those meetings?

A. Well, I can't say that I do.

Q. You'r- not familiar with it?

A. No, sir. I don't know as I ever met a road master who was a member of the association.

Q. Do you know the road master at this end of the line of the Southern Pacific?

A. Not very much. I'm acquainted with Mr.—I can't tell his name now.

Q. Do you know Mr. Fitzgerald?
A. I've been introduced to him.
Q. Do you know Mr. Hart?
A. No, sir.
Q. Then you don't know anything at all about that work?
58 A. No, I seen the work and read it more or less.
Q. What does it purport to be?
A. Well, it's the proceedings before the annual convention of road masters' association.
Q. You don't know anything about any other road than the Union Pacific?
A. I never worked on any other road than the Union Pacific. I've been over them a good deal but never worked on any of them.
Q. Have you noticed whether roads in this western country use the blocked frog or the frog blocked?
A. I think there are more unblocked than there are blocked.
Q. It is more usually unblocked than it is blocked?
A. I think so.
Q. Mr. Yomans, I would ask you this, whether it isn't ordinary or frequently the case that in a very short time after these blocks are put in that they become shattered and unsafe, and becomes even more dangerous than it would be if not blocked at all?
A. Well, I don't know that it becomes more dangerous—think not.
Q. It lasts but a very short time—very soon becomes shattered?
A. Yes, sir.
Q. And isn't that the case right here in the Ogden depot on the Union Pacific?
A. Well, the blocking here was put in about three years ago.
59 Q. But the majority of them in this depot are not blocked?
A. Yes, sir, I think the majority has one or two blocks in, partly blocked.
Q. Is it still unsafe?
A. Certainly.

Redirect Examination.

Examined by Mr. ALLISON:

Q. When that blocking became shattered and worn from use it wouldn't take much trouble to replace it?
A. No, sir, not if we had the blocks.
Q. I understood you to say that it was the express orders of the Union Pacific railway that all its frogs should be blocked?
A. Yes, sir.
Q. That's the policy of the company?
A. Yes, sir.

Recross-examination.

Examined by Mr. MARSHALL:

Q. Your company has a pile of blocks down here in the yard ready for use at any time?

60 A. Yes, sir.

THOMAS A. WHALEN being called for the plaintiff, testified as follows:

Examined by Mr. KIMBALL:

Q. Your name is Thomas A. Whalen?

A. Yes, sir.

Q. What has been your business for the past ten or fifteen years?

A. Railroad conductor.

Q. Of what? Whereabouts?

A. On the Central Pacific, now called the Southern Pacific.

Q. How long were you employed on that road?

A. Nearly eighteen years.

Q. Are you in the employment of that company now?

A. No, sir.

Q. How long since you quit that employment?

A. A year ago last January.

Q. Prior to working for the Central Pacific railroad what had been your business?

A. Railroading.

Q. Whereabouts?

A. Chicago.

Q. What division of the road did you work on when you were working on the Southern Pacic-c road as conductor?

A. Salt Lake division.

Q. You may state whether or not that is the division that includes Wells?

61 A. Yes, sir.

Q. What kind of a conductor were you during the time you were working here, passenger or freight?

A. I was both.

Q. About what part of the time were you a freight conductor?

A. I think about four years.

Q. When?

A. I commenced working on the road in '71 and commenced running a freight train in June, I think, and I run on that for between three and four years and then took a passenger train.

Q. State whether or not you know what a switch frog is.

A. Yes, sir.

Q. You may state whether or not there is any difference between a blocked and an unblocked switch frog, and if so, what the difference is?

A. I never worked where there was a blocked frog.

Q. That wasn't the question.

—. ——.

Q. You couldn't state what the difference is?

A. I know what the difference is but I have seen it.

Q. How did you acquire that knowledge?

A. Well, in a general way I know where the V comes in there, that is filled up with a block and that is what railroad men call a blocked frog.

Q. You have been engaged in the railroad business some ten or fifteen years?

A. Yes, sir.

62 Q. You have mingled more or less with railroad men during that time—men of other railroads?

A. Yes, sir.

Q. State whether or not you have a general knowledge of the railroad business.

A. I have of the train service.

Q. What difference would it make to the safety of the employees who have occasion to use switches and coupling cars if the switch frog was blocked or unblocked?

Mr. MARSHALL: We object for this reason: Mr. Whalen shows plainly that in twenty years' time he has never worked where the blocked frog was used. It is a mere matter of deduction. He is incompetent under those circumstances.

The COURT: I'm inclined to think it would be better to confine the testimony to whether, in working the unblocked frog, such as he has been accustomed to see in use, it was dangerous, and if so how or in what way.

Mr. MARSHALL: We wish an exception noted.

Mr. KIMBALL: I understand you to say you had occasion to use the unblocked frog yourself?

A. Yes, sir.

Q. State what if any danger there is to an employee in the use of frogs on the Central Pacific railroad, you say they are unblocked.

A. Well, while in the act of coupling it the danger is of getting your foot between the rails and if the trains crowds you you can't get it out.

63 Q. Can you tell the jury what the danger consists of, how the rails are constructed?

A. It is the shape of a V if you get your foot in there of course the train comes this way, you can't get your foot out. It holds it.

Q. In other words, your foot forms a kind of wedge?

A. Yes, you get it in and you can't get it out. If you have plenty of time you can get it out.

Q. You may state whether or not that is true of the unblocked frog.

A. Well, of course, more or less there is more or less danger of getting your foot in there. If you watch yourself and don't get your foot in there it isn't very dangerous.

Q. State if you know, what position a person occupies in making a coupling.

A. He stands outside until it comes near enough to couple, when it comes close enough he steps up and takes hold of the link and makes the coupling.

Q. To what is his attention drawn at the time?

A. The coupling. He can't watch his feet at the same time.

Q. You may state whether or not in making a coupling it is necessary for the person making the coupling to go between the cars.

A. Certainly it is.

Q. Can it be done without?

64 A. Well, I've had what they call a Pan Handle car and you have to take a long hoop pole and you might make it or you might not. You know you can make it with your hand.

Q. What is the custom on the road in making those coupling?

Mr. ROYLE: We object, they must show there is no rule or regulation of the company, before they show custom.

The COURT: It seems to me it would be proper for them to show the usual custom on the road. Of course what may hereafter be shown is another thing, but they're proceeding with their *prima facie* case. A rule of the company is hardly like a public law. The workmen are bound to obey it, but the company might waive those rules. The objection may be overruled.

Mr. MARSHALL: We wish an exception.

Mr. KIMBALL: Mr. Reporter, please read the question.

Reporter reads question.

A. Well, it is to take hold of the link with your hand.

Q. As to going between the cars?

A. You go between the cars. You've got to do it.

Q. You have to do it at all times in making the couplings?

A. Yes, sir. I believe there is a rule to require them to use the stick, but you can't do it always.

Q. The use of that stick doesn't obviate the necessity of going between the cars?

65 A. No, you have got to go between the cars.

Q. That's simply to protect the hands?

A. Yes, sir.

Q. I think you said you were a freight conductor on that road four or five years?

A. Somewhere about four years.

Q. Can you state what the duties of a freight conductor is when on the road?

A. Well, his duties are general.

Q. Well, with reference to getting his train over the road?

A. Well, he has the responsibility of getting his train over on time.

Q. What is his duty, if any, with reference to switching and making couplings at yards or on side tracks?

A. He has to help. If he can get along without it, if he has good brakemen, he can get along without it.

Q. You mean throwing switches and everything?

A. Yes, sir.

Q. His duties are the same as brakemen with the addition that he has the supervision of the train?

A. Yes.

Q. Is that so on the Southern Pacific?

A. It was so when I was on there.

Q. How was it a year ago when you left there?

A. I guess it must have been the same. I was on a passenger train then.

66 Q. State whether or not it was an unusual thing for a freight conductor to make couplings when on side tracks or in making up trains.

A. It was not an unusual thing.

Q. You may state, whether or not, if you know, whether or not it was required of them to do so.

A. I don't know as I ever saw any orders or instructions with regard to that. It was understood you was to get your train over the road. I have went out with brakemen so inexperienced that I had to show them how. If you have good brakemen, so much the better. If you have not, you have to perform the duty yourself. You have to show them how.

Q. From the time you left the home station to the time you got back to it, the train was in your control?

A. Yes. And you are expected to control it, get it over the road as fast as you can.

Q. You may state if you know, whether or not it was the custom or duty of the conductor in case of emergencies to make couplings wher he is out on the road or in the yard.

A. Well, I don't know as I ever saw any rule governing it.

Q. I mean independent of rule, whether it was the custom?

A. Certainly, it was the custom to do everything that was done if you didn't have somebody to do it for you.

Q. Then, as I understand you, he would either order the brakeman to do it or he would do it himself under the circumstances?

67 A. Well, if there was a time that the brakeman was at the other end of the train and you was where you could do it yourself, you was expected to do it. On a freight train you had no time to spare.

Cross-examination.

Examined by Mr. MARSHALL:

Q. Mr. Whalen, how many years were you in our employ?

A. I went to work in March, '71, and quit in January, '88.

Q. Mr. Whalen, the duties of a conductor are not ordinarily so dangerous as those of a brakeman are—are they? Isn't it peculiarly dangerous to couple cars? Especially when in motion?

A. Some part of a train has got to be in motion to make a coupling.

Q. Isn't it more dangerous than the other duties of a conductor?

A. That is part of his duty.

Q. The ordinary duties of a conductor is to conduct his train and give orders to his inferiors—instruct his engineer and see his brakemen in *in* their proper places? That is his duty.

A. Yes, sir.

68 Q. See to his passengers, see to his freight and supervise the other work?

A. Yes, sir.

Q. I understand you to say that if no brakeman was convenient and he sees it is necessary to couple cars, he does it?

A. Yes, sir.

Q. Suppose two brakemen are right here, one of whom is experienced, and the other brakeman is standing by, is it his duty to assume the risk and couple the cars when two competent brakemen are standing by?

A. It would be expected that he would see it was done.

Q. I will ask you if it is his duty, if two brakemen are standing there, one of them perfectly competent?

A. I'd have him do it.

Q. The duty of the conductor, as I understand it, is to speed his train and do all things that were necessary for that purpose and see that his inferiors discharge their duty, and that the engineer is at his engine, his fireman is there at the proper time, that his brakemen are in their places?

A. He ain't got much to do with the engineer.

Q. But the engineer is compelled to obey his orders about stopping and starting, and that.

A. About stopping and starting, yes.

Q. The conductor is manager, head of that train?

A. Yes, sir.

69 Q. And frequently the conductor will discharge duties that are not fully within line—for instance, if the engineer is absent, he will act as engineer sometimes?

A. I never have.

Q. Have you ever assisted as fireman?

A. I have been on the ground and given signals to the fireman when the engineer was off.

Q. That is what is generally done by the engineer?

A. You give signals to both of them. The left-hand side is for the fireman, and the right-hand side signal is for the engineer.

Q. You signal to either?

A. Yes, sir.

Q. The brakemen are subordinate to you as conductor?

A. Yes, sir.

Q. They follow your instructions?

A. Yes, sir.

Redirect Examination.

Examined by Mr. KIMBALL:

Q. Suppose, Mr. Whalen, the train is making a switch, taking on a car, and there are two brakemen trying to make the coupling onto this car, one brakeman had tried it once and failed, and
70 the other had tried it twice and failed, what would be the duty of the conductor under the circumstances?

Mr. ROYLE: We object, that is not a correct statement of the evidence. Let him put it fairly.

The COURT: That is a hypothetical question. You may take the answer.

Mr. ROYLE: Note an exception.

WITNESS: If I thought I could make the coupling myself, I would try it.

Q. The question is, would it be his duty under the circumstances?

A. Certainly. He would have to get his train coupled and if his men couldn't do it, he would have to do it.

Q. You may state if it would be a violation of his duty for him to do it in that case.

A. It certainly would not. His duty is everything.

The COURT, to Mr. Kimball: You don't mean a violation of his duty, you mean outside of his duty.

The WITNESS: No, sir. It would not.

Recross-examination.

Examined by Mr. MARSHALL:

71 Q. Mr. Whalen, suppose, as stated, that there was a stationary car and when the engine with three or more cars moved back for the purpose of coupling with the stationary car, with two competent brakemen, one of whom had tried to couple once and failed, and the other had tried to couple twice and failed, and the conductor was warned, told by the brakeman, one or both of them, that the link was too short and not proper to couple with, would it be the duty of the conductor to step in between the cars, disregarding his two brakemen and endeavor to couple the cars?

A. Well, it wouldn't be his duty, no. If he wanted to he could.

Q. Was that his duty—was he employed by his employers to do that?

A. I don't think there is any rule given for that. That he shouldn't do this or that.

Y. Is that the duty he is employed, under those circumstances to do?

A. That would be a matter for his own judgment. If he thought he could do it——

Q. A man can do anything. I asked you was that the duty he was employed to do under those circumstances to endanger his life.

A. No, he isn't supposed to endanger his life.
Q. He wasn't employed to do that?
A. I don't think there was any compulsion about it.

JAMES CASSIN, called for the plaintiff, being sworn, testified as follows:

Examined by Mr. ALLISON:

Q. Where do you reside?
72 A. In Ogden.
Q. What is your occupation at present?
A. I'm at present assessor and collector.
Q. What has been your occupation prior to this time?
A. Railroad conductor.
Q. On what road?
A. Central Pacific, now known as the Southern Pacific.
Q. How long did you occupy the position as conductor on the Southern Pacific road?
A. About 17 years. Seventeen or eighteen years.
Q. And were you occupied in any other capacity than conductor prior to the time you became conductor?
A. Yes, sir, as brakeman, about a year.
Q. So you were employed altogether about eighteen years?
A. Yes, sir.
—. During the time of your seventeen years' service as conductor on that road, on what character of trains were you conductor, passenger or freight trains?
A. Both. About nine years as freight conductor, and seven on a passenger train.
Q. Over what division of the road did you run during the time that you were conductor?
A. Over the Salt Lake division.
Q. That extends from Ogden how far west?
A. In an early day it extended from Ogden to Toano, and afterwards to Wells, and when I left the service of the company it extended to Carlin.
73 Q. That is Humbolt Wells?
A. Yes, sir.
Q. What are the duties of a conductor on a freight train?
A. Well, he has a little of everything. He has charge of the train—charge of the men on the train, make up his train and go load and unload freight and so on.
Q. I'll ask you, Mr. Cassin, to state whether you are familiar with the manner of coupling cars.
A. Yes, sir.
Q. How it is performed by the employees?
A. Yes, sir. Two cars to be coupled, you have to get a link, put it in one car, and as the cars come together, step in and couple the cars.
Q. Is it necessary to step between the cars in order to do that?
A. Yes, sir.

Q. I'll ask you to state here the attention—to what particular part, the attention of the employee is directed during the time he is making the coupling.

A. To the coupling, of course, and to protect himself in the meantime.

Q. To what particular part of the car or the track, must he direct his attention to when he is making the coupling?

A. To the coupling; reaching in and taking hold of the link, and seeing it strikes the other draw-head.

Q. Then he must direct his attention to the draw-head and the link?

74 A. Yes, sir. At the same time looking out for himself.

Q. You are familiar with the duties of a freight conductor on that road?

A. Yes, sir. I was at the time. I couldn't say much about it now. I have been running passenger trains for the past nine years.

Q. You don't know of any particular changes made in the duties of a freight conductor since the time you quit running freight trains, do you?

A. No, sir. Not since I quit working on freight trains. Of course I have *have* had no particular experience in coupling cars since then; there are no couplings to make on a passenger train.

Q. What is the duty of a conductor on arriving at a station where it is necessary to do switching, coupling and training the cars?

A. They have to see that it is done. They have to go to the station and get their bills, see that the brakemen are there attending to their duty.

Q. What, if anything, do they have to do with the actual coupling of the cars?

A. Well, he hasn't anything to do if he has good men there to do it; if not, he has to see that it is done.

Q. Would it be outside the duties of a conductor to make couplings himself?

Mr. MARSHALL: We object to that on the ground that there is no ground to substantiate that question.

75 Mr. ALLISON: We'll change the form of the question. Would it be within the duties of a conductor to effect a coupling?

A. It would if he couldn't get out of it.

Q. Now, Mr. Cassin, suppose the train on arriving at the station or yard was late, suppose there are two brakemen in subordination to the conductor upon the freight train, both of them had endeavored to make the coupling of two cars, one of them had failed to make the coupling once, and the other one had failed to make the coupling twice, and the conductor was present, what would be his duty under the circumstances?

Mr. BOYLE: We object to this hypoth-ical case, it's not a summing up of the evidence.

The COURT: You may ask the question.
Mr. ROYLE: We wish an exception.

A. I think it would be his duty to try and make that coupling. They couldn't stay there all night. He would have to be getting away from there, and he would be the next man to see to it. If no one could do it he had got to see to it. It wouldn't do to go and telegraph the officers that he would have to stay there.

Cross-examination.

Examined by Mr. MARSHALL:

76 Q. Mr. Cassin, were there not printed rules placed in the hands of the conductors while you were on that road, of the company, defining their duties? Both of freight and passenger trains?

A. Yes, sir. The time-card has printed rules. Did have in my time.

Q. Was it one of the rules of the company that required him to perform the duties of a brakeman?

Mr. ALLISON: We object unless he specifies July, 1887. We object to what the rules were after that time. It's what the rules were given to our man.

The COURT: You will confine yourself to that time.

Mr. MARSHALL: Were these the rules in 1887?

A. I think so.

Q. You were not on the road then?

A. Yes, sir.

Q. Didn't you have the rules attached to the time-card?

A. Yes, sir. I was on a passenger train, so I didn't know much about it.

Q. There were rules, were there, for both trains?

A. Yes, sir.

Q. I want to ask you a question, suppose you had arrived at Wells on your way east with your train, and instead of being late, though you may have been late, when your engineer was absent to get his dinner, and he had time sufficient to get his dinner, and the fireman was acting by instructions as engineer, moving the train about for the purpose of switching, and you went back to
77 where a coupling was to be made, and you found two competent brakemen, one of whom was an experienced brakeman, one brakeman had endeavored to couple the cars and had failed, the second brakeman had endeavored twice and failed, and those brakemen had found that the reason that they had failed was that the link was two short or crooked, would it have been your duty as conductor to step between those two cars under those circumstances, with your engineer getting his dinner, and with those two brakemen right by your side, both of whom had tried and failed, would it have been within the scope of your duty to step in between those two cars and make that coupling yourself?

Mr. ALLISON: We object, not a proper statement of the evidence. He included within that question that Conductor Seley had been warned by both these brakemen. There's no evidence that the other brakeman was standing close by.

Mr. MARSHALL: I'll change that question. That one of them had warned him that the link was too short, and I'll ask you if you would then consider it your duty without instructing your brakeman to take another link, and a larger link, for you to take the risk in stepping between there and endeavoring to make that coupling with the small link?

A. No, sir. I should have instructed him to get another link. My judgment might have been better than his and I might not have instructed him to make the coupling with the larger link.

Q. Mr. Cassin, how many years were you in our employ?

78 A. I commenced work for the company in 1869, if I remember.

Q. Were you on this division then?

A. Yes, sir.

Q. And remained on here ever since?

A. Yes, sir.

Q. When did you leave?

A. In December, 1887.

Q. Hasn't it always been one of the duties of a conductor to familiarize himself with the track he passes over, know the safety of the track, and the condition of the track?

A. No, sir. We had nothing to do with the track.

Q. Didn't you pay any attention to the track?

A. Of course, if we noticed anything wrong we'd report it to the road master.

Q. Wasn't it one of your duties to know where switches were and where frogs were located?

A. A man would certainly know that after he had passed over them a few times.

Q. Well, a man who had been in the employ and running over that two or three times a week as conductor, would he not know that the blocked frog—or the unblocked frog was used?

A. Yes, sir. He would.

Q. Do you know whether the blocked frog was ever used on the line of the Central Pacific or Southern Pacific?

A. No, sir. I don't think it was. I never remember seeing it there.

79 Q. As a conductor, didn't you know the whole time that these frogs were unblocked?

A. Yes, sir.

Q. And necessarily so, was it not, for your own self-protection?

A. I knew there was no blocked frogs on there.

Q. Was it in '87 that way?

A. They were when I stopped running freight. These may have been some on there during the past five or six years. I don't know of any.

The COURT, to the witness: You have stated something about the duties and practice on that road of a freight conductor. Of how many men did a freight-train crew usually consist?

A. Of a conductor and two brakemen. And the fireman and engineer.

Q. Now, did the duties of the conductor and brakeman in any way—were they in any way connected with that of the fireman and engineer? I mean, were they co-laborers in any way with the fireman and engineer?

—. No, sir.

Q. They did not assume to go upon the engine when the fireman and engineer were absent and fire and run the engine?

A. No, sir. Still I've fired when the fireman was sick.

Q. In case of an absolute necessity?

A. That's all.

80 Q. Calling attention to the conductor and two brakemen, was the conductor employed purely and merely as an overseer of the two brakemen and of the fireman and engineer, or was he employed in the double capacity of overseer and as a co-laborer? What do you say about that?

A. The company rules said he had full charge of the train and all on board the train was subject to his orders. But as a rule among the men themselves he had little to do with the engineer.

Q. But talking about the two brakemen and the conductor? Was he as to them, a co-laborer in making up and running the train and doing such things as was necessary, and in addition to being an overseer was he a co-laborer, or was he purely and wholly an overseer?

A. He was both. He was an overseer, but still the company held him responsible, and they would look to him to get that train over the road. If there were men on there incompetent he would have to do the work. In general practice he was in addition to being an overseer, he was a co-laborer with the two brakemen.

Q. You say there never were any blocked frogs while you were on the Southern Pacific?

A. No, sir. Not while I was there.

Q. Suppose—I'm asking for your knowledge as a railroad man, suppose you were employed to-day to commence to-morrow to work as a conductor on a freight train upon some new road that

81 you never had been on, do you think you would necessarily know the first time you went over the road as to whether the frogs were blocked or unblocked?

A. No, sir. I would not.

Q. Well, are the frogs plainly to be seen?

A. Yes, sir.

Q. Well, suppose you were to make a twenty-four-hour trip, part of that time would be during the day, would you become acquainted that the frogs were blocked or were not?

A. Yes, sir. I would. At the first station I would notice whether they were blocked or not, because that's something you couldn't help noticing.

Q. So it is always to be seen here the tracks are approaching?
A. Yes, sir.
Q. That is, they would be plainly seen?
A. Yes, sir.

Mr. MARSHALL, to the witness: Mr. Cassin, if a conductor had been on the road six or seven months, would he not necessarily know whether it was the blocked or the unblocked frog that was used? The court asked you if you could the first time, if he has been there for six or seven months, would he not be apt to know about it?

A. He would.
Q. As to their being co-laborers, I understood you to answer they were?
A. Yes, sir.

82 Q. I desire to ask you if you did not mean co-laborers in getting the train over the road as speedily as possible; whether it isn't the duty of the conductor to see that the brakemen discharge their duty and appear at their places, one in front and one in the rear of the train, and whether that is not what you mean by their being colaborers?

A. Yes, sir.
Q. I want to ask you further, the conductor is not required to do the duties of the brakeman on ordinary occasions, is he?
A. No, sir. If he had good competent men he wouldn't have to do it.
Q. It wouldn't be his duty to discharge their duty?
A. He wouldn't need to. It's his duty to see that the work is done, and if these men were good, competent men it's his duty to see them do it. There would be very little he would have to do.
Q. Tell them to discharge their work and he would do his?
A. Yes, sir. If they were competent men there would be very little he would have to do.

ISABELLA SELEY, called for the plaintiff, being sworn, testified as follows:

Examined by Mr. KIMBALL:

Q. Your name is Isabella Seley?
A. Yes, sir.
Q. You are the plaintiff in this action?
—. ——.
Q. William H. Seley was your husband?
A. Yes, sir.

83 Q. What was his age, Mrs. Seley?
A. Forty-one years old when he was killed.
Q. What had been his business prior to the time of his death?
A. Railroad conductor.
Q. How long had he been a railroad conductor?
A. About seven years.
Q. Do you know what his business was prior to that time?

A. Brakeman.
Q. On the railroad?
A. Yes, sir.
Q. State what, if you know, his wages were as a railroad conductor.
A. Ninety dollars a month.
Q. What means of support had you and your children outside of the wages of your husband?
A. Nothing.
Q. Nothing at all?
A. No, sir.
Q. You and your children were entirely dependent upon him?
A. Entirely dependent upon what he earned.
Q. How old are your children?
A. The oldest one is fourteen.
Q. Now, or at the time of his death?
A. At the time of his death.
Q. How many children have you?

84 A. I have three. The next one was nine, and the youngest one was two years and a half at the time of his death.

Q. You had not been married more than once?
A. No, sir.
Q. You say his wages were ninety dollars a month for the total time he was conductor, and that he was conductor seven years?
A. Yes, sir.

Cross-examination.

Examined by Mr. MARSHALL:

Q. On what road had he been conductor?
A. It was called the Central Pacific then.
Q. He had been conductor on this line all that time?
A. Yes, sir.
Q. On what division was it?
A. The Salt Lake division.
Q. In what capacity had he been employed all that time?
A. Part of the time as conductor and part of the time as brakeman.

85 Mr. ALLISON: We introduce in evidence the Encyclopedia Britan-ica, vol. 13, p. 175, to show the mortality table. They are the Carlisle tables. We introduce it to show the expectancy of a man 41 years of age.

Mr. ROYLE: We object, the proper foundation has not been laid for this testimony, in this, that they haven't shown that this is an accepted book of science. And that it doesn't come within the purview of the statute.

The COURT: You will have to show by some witness that the Carlisle tables are commonly accepted as a criterion.

Mr. KIMBALL: We have another witness to what the duties of a freight conductor are.

The COURT: I suppose the testimony is about the same as the others?

Mr. KIMBALL: Yes, sir. To the same point.

Mr. KIMBALL: I expect to call Mr. A. G. Fell to show that it was the duty of a conductor to make couplings in a case of emergency. Mr. Fell was the superintendent of the Salt Lake division of the Southern Pacific road at the time the accident occurred, and that it was a part of the conductor's duty under emergency to couple cars and make up the train, and I expect to show further, by him that under the particular circumstances of this case the conductor wasn't departing from any duty imposed on him by the company.

Mr. MARSHALL: I don't suppose it will change the character of the case.

86 The COURT: Mr. Kimball, I wish to ask you as matter of fact if you claim that the deceased did not know that the frogs were not blocked?

Mr. KIMBALL: No, sir. We say that he did know it. We think under the evidence is that he did know it.

Mr. MARSHALL: I now move a nonsuit in this case, on the ground that the evidence on the part of the plaintiff doesn't show negligence on the part of the defendant; that it does show contributory negligence on the part of the plaintiff.

Which motion the court overruled.

Mr. MARSHALL: We wish an exception to the ruling entered.

P. HANSON, called for defendant, being sworn, testified as follows:

Examined by Mr. MARSHALL:

Q. Mr. Hanson, what business are you engaged in at present?
A. I am road master on the Southern Pacific road.
Q. At what point?
A. Wells.
Q. How long have you been so engaged?
A. Year and ten months.
Q. Where were you on the seventh of July, 1887?
A. I was in Elko.
Q. Are you familiar with the track and with the railroad system of the Southern Pacific railroad?
A. Yes, sir.
Q. Do you know what character of frogs were used by the Central Pacific Co., or Southern Pacific Co., for the last five or ten years?

87 A. Yes, sir.

Q. Well, state what character of frogs were used, blocked or unblocked.
A. They're known as the fixed-rail frog.
Q. Has the blocked frog ever been used on the Southern Pacific system?
A. No, sir. I've been both North and South and East and West on the Southern Pacific system and I never saw one.

Q. Are you familiar with any other roads and their system?
A. Not of late years.
Q. Well, what other roads have you been employed on?
A. Union Pacific about twenty years ago.
Q. You are not familiar with any other system lately?
A. No, sir.
Q. Mr. Hanson, when you were employed on the Union Pacific did they use the blocked or unblocked frog?
A. There was no such thing as an unblocked frog at that time as I know of. In those days they used what is known as the cast frog Since then different frogs has been introduced.
Q. In those days they used cast frogs?
A. Yes, sir.
Q. That extended back as now only a short distance?
A. They was a short frog.
88 Q. Didn't that old cast-iron frog—didn't it extend back and still leave the rails approaching each other?
A. Yes. There was a chance for an opening at the end.
Q. There was a risk still left there?
A. Yes, sir.
Q. How long have you been familiar with the Southern Pacific system?
A. In '69.
Q. And during all that time I understand you to say the unblocked frog has been used?
A. Yes, sir.
Q. Mr. Hanson, in your opinion from your experience, would every conductor on that road become familiar with the fact?
A. Yes, sir, in a very short time.
Q. And a conductor who had been employed by the company and running over the track for seven or eight years, would be very apt to know that fact, would he not?
A. Yes, sir.

Cross-examination.

Examined by Mr. KIM-ALL:

89 Q. I understand you to say that the cast frog was a safer frog to use so far as employees having occasion to use the track, than the one now in use?
A. The cast frog was used at the time that the old style of iron rails was in use on the road—a low rail. Since the construction of the steel rail I haven't seen the frog.
Q. But you don't answer my question, whether the cast frog used for years was safer for employees than the one at present in use.
A. I should consider it would, that is, the opening was smaller and there was less of it—not so long.
Q. Not so much opportunity to catch your foot?
A. Certainly.
Q. When that system of frog was in vogue blocking the frogs wasn't in use on any railroads, was it?

A. Not that I know of.

Q. How long have you been in the railroad business?

A. About twenty-two years.

Q. And principally on the Southern Pacific and Union Pacific railroads?

A. Yes, sir.

Q. You're road master—how long have you been road master.

A. Well, permanently about a year and ten months. Previous to that time off and on.

Q. Off and on what period of time have your duties been that of road master?

A. About seven years.

90 Q. Previous to that time were you engaged upon the track?

A. I was section boss.

Q. You have made a study of your business, more or less, haven't you?

A. Yes, sir.

Q. Can you say when the safety block and the switch frogs and guard rails first came into vogue, or whether it is so with any railroad company?

A. I cannot say.

Q. Can you say that it is used by any railroad?

A. I merely seen it back East while on a pleasure trip. I didn't take any particular notice.

Q. Do you know what the safety block is?

A. Yes, sir.

Q. Well, what effect does the use of one of those safety blocks have on frogs—you can explain it to the jury by referring to that diagram there?

A. Well, I can't say it would have any effect on the frog. The safety block would be in here between the rails, between the point here—this point is supposed to be nine inches apart here, the two rails come together within two inches. They cannot get together right up to a sharp point, consequently we'd have to put in a block here four feet or here three feet back in order to make it effective.

Q. When you put it in, it fills up the space?

A. For the time being.

Q. And if kept in repair for all time being?

A. I couldn't say about that.

91 Q. It would fill up that space there?

A. Those two spaces there. Here and here is a space also.

Q. Well, that is the guard rail, it can be filled up too, can't it?

A. Certainly.

Q. And it is blocked on some roads, isn't it?

A. I presume it is.

Q. The block is put in there to fill up the space between the ball and the flange of the rail?

A. That's the intention.

Q. What's that done for, do you know?

A. It is done as a guard against danger.

Q. What kind of danger?

A. Danger of catching the foot.
Q. Well, to switchmen?
A. Switchmen and brakemen, and other men having to use or handle the cars on the track.

Redirect Examination.

Examined by Mr. MARSHALL:

Q. Mr. Hanson, are those safety blocks liable to frequently get out of repair?
A. Yes, sir.
92 Q. Are they then safer or more unsafe than the unblocked frog?

Mr. KIMBALL: I object as incompetent. That's assuming they leave them out of repair.
The COURT: They might go further and show they are liable to get out of repair suddenly. I'm inclined to think they had better take the testimony.

A. Yes, sir.
Q. How is it then as regards protecting railroad men, does the danger increase or diminish by the use of the safety block's liability to get out of repair?
A. I should suppose that where switchmen or trainmen once get used to a block they would use less care in switching around the frog in the future and that if such blocking should get out of order he would be more liable to get caught.
Q. I'll ask you if it is liable to frequently get out of repair.
A. Yes, sir. I see a case right over here this morning where there is a blocked frog and still you could get your foot in under the block and get caught.
Q. The block frog becomes shattered?
A. The block itself becomes shattered and worn along the side of the rail.
Q. Is it then worse than no block at all?
A. Yes, sir. I should consider it so.

93 *Recross-examination.*

Examined by Mr. KIM-ALL:

Q. If the road master did his duty he would keep those blocks in repair, wouldn't he?
A. That's a hard question to answer. It depends on how much help a man would be allowed for such a purpose as that. Another thing, would a man be allowed help night and day to keep those blocks in repair?

A. G. FELL, called for the plaintiff, being sworn, testifies as follows:

Examined by Mr. KIMBALL:

Q. Your name is A. G. Fell, is it?
A. Yes, sir.
Q. You reside in Ogden?
A. Yes, sir.
Q. Were you ever engaged in the railroad business?
A. I have been.
Q. During what time and for what length of time?
A. About twenty-two years.
Q. Where?
A. A good part of the time in Ogden.
Q. In what capacity?
A. For nineteen years as telegraph operator, agent and dispatcher and superintendent of division.
Q. How long were you train-dispatcher?
94 A. About eleven years.
Q. How long were you superintendent of the Salt Lake division?
A. Nearly nine years.
Q. On what road was that?
A. The Southern Pacific.
Q. Were you such superintendent in the summer of 1887?
A. I was.
Q. Including the month of July?
A. I was.
Q. Were you acquainted with W. H. Seley?
A. Very well.
Q. He was employed on your road and in the capacity of a freight conductor, was he?
A. Yes, sir.
Q. Do you remember the fact of his being killed?
A. Yes, sir. I remember it.
Q. At that time state whether the use of the blocked frog was in vogue on your road.
A. Not on the Salt Lake division.
Q. State what the duties of a freight conductor was on the Salt Lake division.
A. Well, a conductor had a great many duties to perform.
Q. With reference to working the train?
A. The conductor had full charge of the train.
Q. That's when on the road?
A. Yes, sir.
95 Q. He had full charge of the train and directed the work?
A. Usually he had two brakemen. Those men as a rule would do the switching, unloading freight and matters of that kind. Sometimes the conductor assisted in the switching.
Q. What do you mean by switching?

A. Well, moving the cars from one track to another, coupling the cars at the station or taking on more.

Q. It includes the coupling of cars.

A. Coupling of cars.

Q. You may state whether it was outside of his duty as conductor to couple cars himself or do the switching.

A. Ordinarily it would be considered so, but in some cases the conductor was expected to do the switching.

Q. Under emergencies they would be expected to do it?

A. Yes, sir.

Q. Suppose a freight train came into the station of Wells late, a conductor was in charge of that train with two brakemen, and there was considerable switching to do at that station and one of the brakemen was a new hand and he'd tried to make the coupling once, in coupling onto a car to take it into the train, and the other brakeman had tried to make it on two occasions and failed—the first one had failed once and the other twice, what would be
96 the duty of the conductor under such circumstances with reference to making or not making it?

Mr. ROYLE: We object to his hypothetical case. It's not within the evidence here.

The COURT: The same ruling as before.

Mr. ROYLE: Note an exception.

A. Well, in such a case as that, it would be most natural for the conductor to assist in making the coupling. He would have to do the work as quickly as possible to save time.

Q. Would it be an unusual thing for him to attempt to make the coupling himself?

A. Not at all.

Q. Suppose, just before he attempted to make that coupling, he had gone in to make it and the brakeman had called attention to the fact that the link was too short and he couldn't make it with that one and the brakeman had gone off to get a new link and put it in the draw-head and the conductor remained standing by the stationary car, and the brakeman got the new link and put in the draw-head and subsequently the conductor, after the link was fixed and the train backed up, stepped in to make the coupling, you may state whether that would be outside of his duty after the brakeman had gotten the new link on; whether he should have called upon the brakeman to make the coupling.

Mr. ROYLE: We make the same objection.

The COURT: The same ruling.

Mr. ROYLE: Exception.

97 A. Well, it wouldn't be outside of his duty to do that. The brakeman could as well attempt recoupling again, but if they were pressed for time and the conductor felt he could make the coupling, while possibly the brakeman could not, it would be the natural thing.

Q. Wasn't it a matter for the conductor to exercise his judgment on at the time?

A. Yes.

Q. I understood you to say awhile ago that they were not in the habit of using on the Salt Lake division, during your superintendency, the block frog or safety block in switch frogs?

A. That was right.

Q. Have you had any experience with the use of the block switch frogs or safety blocks?

A. I have not. I know what they are and have seen them.

Q. Do you know what they are?

A. Yes.

Q. Well you may explain to this jury how the safety frog is used; how the safety block is used and what condition it puts the track or the frog in?

Mr. MARSHALL: I object; that's a matter for the jury to draw its own deductions. This man is not an expert.

Mr. MARSHALL to the witness: Have you ever worked on a system where it was in use?

A. Never did.

Mr. KIMBALL to the witness: You made a study of your business?

A. Yes, sir.

98 Q. And had that matter called to your attention, hadn't you?

A. I heard it discussed a good deal.

Q. And you have seen them in use?

A. I have seen them in use.

The COURT: Go on.

Mr. KIMBALL to the witness: There is a diagram showing the frog. Now, Mr. Fell, in your opinion as a railroad man would it or would it not add to the safety of employés to use the safety blocks?

Mr. MARSHALL: We object—that is a matter in which expert testimony is not admissable, and if it is that Mr. Fell has shown no experience whatever with the block frog. It is merely his deduction as a railroad man and not competent as an opinion.

The COURT to the witness: Mr. Fell, have you ever given any attention to that subject as to which would be the safest?

A. I never gave it any special attention. I have heard the matter discussed but I never investigated that subject.

The COURT: I am inclined to think you ought not to take that testimony.

Mr. KIMBALL to the witness: How long had you known Mr. Seley and how long had he been in your employ?

A. I think I first met Mr. Seley in 1872. I believe he was engaged on the road while I was train-dispatcher and superintendent, something like twelve or thirteen years.

99 Q. And up to the time he was killed?
A. Up to the time he was killed.
Q. What kind of a man was Mr. Seley with reference to being a cautious, prudent man or otherwise?
A. Mr. Seley was considered a very good man and well qualified to discharge the required duties.

Mr. MARSHALL: We ask that that question and answer be stricken out, as immaterial and irrelevant; that as to what his habits of care and caution; there has been no charge of that character and it don't cut any figure in this case and is not material or relevant.
The COURT: I am inclined to think you may show what kind of a man he was and whether he was an active man, a man in full possession of his faculties, and as to how much experience he has had, but to show that he was usually careful, might be improper testimony as bearing upon the subject as to whether it was negligence for him to go there. I am inclined to think it is upon reflection—that it is improper. I shall at present, at least, allow it to be stricken out, so far as it shows his habits of care.
Mr. KIMBALL: We accept the ruling of the court.

Q. Mr. Fell, what aged man was Mr. Seley?
A. I think probably 39 or 40. Possibly not so old.
Q. How large a man?
A. He was a man of rather under the medium size.
Q. About what was his weight?
A. I should think from 140 to 145 pounds.
100 Q. Was he a man in good health at the time you last saw him?
A. I believe he was—I think he was.
Q. Was he active or otherwise?
A. Quite an active man.
Q. How long had he been in charge of a freight train on that road?
A. Well, I think altogether during 12 or 13 years, possibly five years. I couldn't exactly state how long, probably five years; may have been less or may have been more.
Q. What, if any, accident had occurred to his train or him prior to this time, if you know?

Mr. ROYLE: We object; what's the purpose?
Mr. KIMBALL: To show he was a careful man
Mr. MARSHALL: We object, it is immaterial and irrelevant.
The COURT: Objection is sustained.
Mr. KIMBALL: We take an exception.

Q. Mr. Fell, do you know what wages Mr. Seley was earning while he was conductor?

Mr. MARSHALL: I don't think that's denied.

Cross-examination.

Examined by Mr. MARSHALL:

101 Q. Mr. Fell, a hypothetical case has been put to you as to what would be within the duties of a conductor, under certain circumstances. I desire to put that question to you somewhat differently. Suppose Mr. Fell, a conductor whose train had arrived at Wells, and *and* whose engineer was getting his dinner and not pressed for time, and was switching and making up his train, and he had two brakemen, one of whom was perfectly competent and efficient and the other was slow, but as far as we know competent—a little lazy—and in coupling a car to the train these brakemen, one of them, because the link was too short, failed once, the other brakeman had failed twice, and the conductor coming up undertook to couple it himself with the small link and he was notified by his brakeman that he wouldn't do it with that link and thereupon a larger link was obtained; was it the duty of a conductor to couple those cars himself?

Mr. ALLISON: We object to the question. The evidence so far as it is in now shows they were pressed for time.

The COURT: That is simply a hypothetical question. If a person puts a hypothetical question that is not backed up by evidence, the jury will weigh that.

Mr. ALLISON: Note an exception.

Mr. MARSHALL to witness: Under those circumstances was it within the line of his duty to do the coupling?

A. There is nothing to prohibit him to make the coupling if he thought he could do it quick.

102 Q. Was that in the line of his duty to do it or was it the duty of a brakeman?

A. That would be a matter of his own discretion, whether he could quicker make the coupling or whether he should make the brakeman. If he wished to make it himself he could do so.

Q. Couldn't he order his brakeman to do it?

A. Certainly he could do that.

Q. Isn't that the ordinary position of a conductor and brakeman, the brakeman to do the coupling and the conductor to direct it?

A. Well, yes, if they were pressed for time, a great deal of work to do, and the conductor was more expert than his brakeman, he might do it; he would do it. Any conductor who wanted to get over the road and make its time would do it.

Q. Were there any printed rules that designate what the conductor's duties were; were there in 1887?

A. Yes, sir, there were a great many. I presume there are yet.

Q. Did that designate the particular duties of conductors and brakemen?

A. They define the duties so far as rules can; there are a great many things there are no rules laid down for. The men have to use their own judgment in a great many matters.

WEDNESDAY, *March* 6, 1889.

T. P. CROSBY, called for the defendant, testified as follows:

Examined by Mr. MARSHALL:

Q. Mr. Crosby, you are the engineer of the train, were you not, at Humboldt Wells, at the time Conductor Seley was killed?
A. Yes, sir.
Q. Do you remember at what time you arrived there that day?
A. No, I don't. I think we arrived there about on time.
Q. What were you doing at the time of the accident?
A. At the time of the accident I was going toward the engine from the hotel. I was on my way to the engine.
Q. What had you been doing?
A. I had been eating my dinner.
Q. Did you ordinarily eat dinner at that station?
A. Yes, we had time there—over an hour.
Q. It was an eating station and you generally stopped there over an hour?
A. Yes.
Q. Have much switching to do at that station?
A. There used to be some there every train.
Q. Do you remember whether you were on time or not that day?
A. No, sir, I don't recollect.
Q. Do you remember whether you were about on time?
A. We were very near on time.
Q. Do you remember whether you were in any particular hurry for any reason?
A. I don't think we were.
Q. To go back of your memory, what is your *vast* impression whether you were in any particular hurry, more so than ordinary?
A. I don't remember that we were in any particular hurry. We had over an hour of time and we didn't have to hurry to get out of there on time.

Cross-examination.

Examined by Mr. KIMBALL:

Q. What time did that accident occur?
A. I couldn't say that. I think it was somewhere round 1 o'clock.
Q. Was it somewhere round 3 o'clock?
A. No, I don't think it was. I know we were there a long time after the accident, and we got out of it—we had the coroner's inquest, and we had to delay there before we could go on.
Q. Your train was due there at 11.52?
A. I don't recollect. It might have been.
Q. And due to leave there at 12.53, wasn't it?
A. It might have been.
Q. Well, look at that time-table and see if it was the time-table of that date and what time-table it is.
A. Well, this is an '88 time-table.

Q. Do you know whether this is the same time-card you were running on then?

A. I don't think it is, because they change the time-cards pretty often.

Q. You have no recollection that you did arrive or of the time that you were to arrive there?

A. I think we were there pretty near on time because we were double-header up and we made pretty good time. We didn't have much work to do on the road.

Q. Are you positive that you were there nearly on time?

A. Well, I understood the head brakeman to say we were there on time.

Q. Did you hear the head brakeman's testimony here yesterday?

A. Yes, sir.

Q. Didn't he testify here you were behind time?

A. I don't remember whether he did or not.

Q. They were there very nearly, then, on time? You are not relying on your own knowledge?

A. No, sir.

106 *Redirect Examination.*

Examined by Mr. MARSHALL:

Q. You have given the best of your memory?

A. Yes, sir.

Q. You were about on time?

A. I know we left Carlin pretty near on time. It is a slow run and we didn't have very much to do.

MARTIN CULLAN, called for the defense, being sworn, testifies as follows:

Q. What's your first name?

A. Martin.

Q. Were you employed in July, 1887?

A. Section foreman.

Q. Were you present at the time of the accident?

A. No, sir.

Q. Were you in the employ of the Southern Pacific railway at that time?

A. Yes, sir.

Q. Were you section foreman at that time?

A. I was employed at the Ogden yards at that time.

Q. Mr. Cullan, what do you know relative to the use of the blocked or the unblocked frog? What frog has been generally used on the S. P. system since you have been on it?

A. We used the cast-iron frog and the fixed-rail steel frog.

Q. Well, have you ever seen the block frog used? The
107 frog with blocks. I don't mean the cast-iron blocks.

A. I have seen it used.

Q. Whereabouts?

A. On the U. P. railway.
Q. Are they now used at this end of the line?
A. No, sir.
Q. What become of them, have they abandoned them?
A. The train cut them up so that they ain't no use.
Q. How long have you been in the employ of the Southern Pacific?
A. I have been there thirteen years the 1st of April.
Q. And during that time the Southern Pacific never have used the block frog?
A. No, sir.
Q. Have you ever been employed by other railroads?
A. Yes, sir. I worked on the Union Pacific nine years, and on the Hannibal and St. Joe a year and eight months.
Q. What frogs were used there?
A. It wasn't what's called the fixed-rail frog; it was the common frogs they used in them days.
Q. Did they use there the wooden block frogs?
A. No, sir.
Q. Never did use it, while you were there?
A. Never seen none.
108 Q. Any road you ever worked on use it?
A. Them is the only three roads I ever worked on. The Union Pacific and the Hannibal and St. Joe, and the Southern Pacific.

Cross-examination.

Examined by Mr. ALLISON:

Q. How long have you been in the employ of the Southern Pacific?
A. Thirteen years next April.
Q. You are now an employé of the company?
A. Yes, sir.
Q. In what capacity?
A. Foreman of the yard.
Q. Ogden yard here?
A. Yes, sir.
Q. What do you mean by cast-iron frogs?
A. I mean a frog made out of cast iron.
Q. Is that what they call a block frog?
A. It's all sol-d iron frog. There is no blocks used on it.
Q. It isn't necessary, is it?
A. Yes, in case they wanted to, they could use blocks.
109 Q. And I understand you to say the Southern Pacific now use the cast-iron frog and the steel-rail frog?
A. I said in my time on the Southern Pacific we used the cast-iron frog and the fixed-rail frog.
Q. You are still engaged on the Southern Pacific?
A. Yes, and we use some of them iron frogs in this yard yet.

Q. Now this space between the two rails in the cast-iron frogs, are they closed?

A. We ain't got no cast-iron frog like that. That is a fixed-rail frog.

Q. You say there are some on the Southern Pacific system now?

A. Yes, I say those cast-iron frogs are now in use by the Southern Pacific Company.

Q. Is that space between the two rails filled up?

A. The cast frog ain't as long as that frog. It's this long. In here there is a solid block; its solid iron itself, then the rails fix in here and there is a space comes out that distance that might be blocked or might not.

Q. But when you get out that far from the base of the form, the space is too large to enclose a man's foot, isn't it?

A. It isn't in here.

Q. You say that this might be blocked?

A. I say a man could block it back there.

Q. I ask you if a man could catch his foot in here?

A. Well, it might be a little wide back there, but in here,
110 in the head of the frog he would catch his foot.

Q. In here in the base of the frog, isn't it a fact that solid iron casting fills it up under the balls of the rails between the ball and the flange?

A. It does down to the point, but not where your pencil is.

Q. Isn't that a dangerous place? More dangerous than out here where you say the casting is?

A. No, you can't get your foot in there.

Q. Suppose the casting was out, then what?

A. If the casting were out—but they don't make that frog of late.

Q. Isn't that the casting there? It's called a block frog, isn't it?

A. It's a cast-iron frog, it ain't called no block frog.

Q. Or a frog block?

A. It ain't called anything only a cast-iron frog.

Q. You say that the U. P. railroad don't use any blocks in their frogs now?

A. Not at present. There is one cast frog down there with an old block, I see after looking over the whole yard, and that's all.

Q. You went over the yard yesterday?

A. Yes, sir.

Q. Well, do you know that — is adopted by the U. P. road not to block its frogs?

A. It seems to be.

Q. Never mind, I ask you if you know it.

111 Mr. MARSHALL: We object to that question. What their policy is, is immaterial.

The COURT: He says he don't know.

The COURT to the witness: I don't understand what you mean by a cast-iron frog. If I understand you this is something the way these rails are?

A. Yes, sir, that's the way the frog is made and they are made

right together, so, and the frog runs out here a piece and there is a point goes under these rails and that leaves a point right in there.

Q. Well, now the cast-iron frog is solid up here?

A. Yes.

Q. Solid up here to where the two rails come together and the two rails go into it?

A. Yes, sir.

Q. How far across up there where that fills it in is where the cast-iron frog stops?

A. Eight inches.

Q. Well, that would be to- wide then to pinch between the two rails on each side of a man's foot?

A. About three feet from where the rail goes into the frog it is narrow enough to catch a man's foot.

Q. You say it is narrow enough in there to catch a man's foot?

A. Yes, sir.

112 *Recross-examination.*

Examined by Mr. ALLISON:

Q. You say that your foot could be caught over on the top of this cast-iron block and then between the top of that and the ball of the rail?

A. No, I say where the rails fit into the frog that if a man gets his foot in there it will catch him.

Q. How long ago was it you worked on the Hannibal and St. Joe?

A. About twenty-four years ago.

Q. You don't know what they use on that road now?

A. I have not been back there since.

HENRY COMPTE, called by the defendant, being sworn, testifies as follows:

Examined by Mr. MARSHALL:

Q. In what business were you engaged July 7, 1887?

A. I was firing a locomotive on the Southern Pacific Company, between Carlin and Terrace.

Q. Mr. Compte who had charge of the engine and at whose orders were you acting at the time of the accident to Conductor Seley?

A. You mean who the engineer was?

Q. Who acted as engineer that day?

A. Mr. Crosby.

Q. Who had charge of the engine at the time of the accident?

113 A. Well, Mr. Seley, the conductor. I was running the engine at the time of the accident.

Q. You were running the engine?

A. Yes, sir.

Q. By whose orders were you running the engine?

A. By the conductor's.

Q. State what order the conductor gave you relative to running the engine at that time.

A. We were standing at the house track unloading way freight, and I cleaned my ash pan and filled the lubricators, and he came up to me and asked me if I was through with my work. I said yes, and he told me to take the engine and go up to the coal shed and do some switching, and I went up with the two brakemen.

Q. You carried your train up there?

A. Yes.

Q. Now please state precisely what occurred at the time of the accident. Who made the signals to you as near as you can recollect?

A. In going up to the coal shed we switched off two cars onto the train and dropped two cars onto a side track, and then we went up to the coal shed with the light engine, and picked out four cars that were in the coal shed, and brought them out and backed down the main line.

Q. Was Mr. Seley with you then?

A. No, sir.

114 Q. When did he join the train? Tell your own story.

A. When we was backing down to couple onto these cars the brakeman, he was a tall young man, tried to make a coupling and couldn't do it, then Hardy stepped in to make it and he failed, and he still gave a signal to back up and went in to make the coupling a second time, and as he came out Mr. Seley came up and they both—the brakemen—began to give the signal to back up, then Mr. Seley stepped in between the train and stepped out and walked down in the same direction the train was moving, giving the signal all the time to come back, and he walked probably fifteen feet I should judge, and stepped in again between the cars. Then I didn't see any more of him. Hardy stood alongside and gave the signal to back up slow, and all at once he gave a signal with both hands and hollowed, and I reversed the engine, put the air on, and then he hollowed to me to pull up a car's length. I did so and then went up and asked what was the matter, and saw we had run onto him.

Q. I want to ask you, were you in any extra hurry on that day with your train?

A. Nothing was said to me about being in a hurry. I didn't know we was in a hurry.

Q. Do you know any reason why you should be in a hurry that day?

A. No, sir.

A. G. HART, called for the defendant, being sworn, testifies as follows:

115 Examined by Mr. MARSHALL:

Q. What is your full name?

A. Alva Gus.

Q. Mr. Hart, what is your business at present?
A. Road master.
Q. For what road?
A. The Southern Pacific.
Q. How long have you been thus engaged?
A. Six years.
Q. Mr. Hart, on what other roads have you worked?
A. New York Central and Hudson River railway.
Q. How long have you worked on the New York Central?
A. Five years.
Q. How long on the Hudson River?
A. They were all one road.
Q. How many tracks and what length of track does that combination run?
A. Four parallel tracks. I do not know how long the whole system is.
Q. They had four parallel tracks?
A. Yes, sir.
Q. Two of these occupied for freight and two for passenger?
A. Yes, sir.
Q. Any switches, turnouts, and frogs used on that route?
A. Yes, sir.

Q. Were you familiar with the character of those?
116 A. I was on the part of the road I was on.
Q. What was the character of the frogs there, blocked or unblocked?
A. Unlocked.

Mr. ALLISON: We object to that. This is their own witness. They have placed him upon the stand and they are endeavoring to show by this witness that the block frog is not customary to be used and this cannot possibly show a custom where it is only used by one railroad company.

The COURT: I think he might testify to it as far as he knows. Objection overruled.

Mr. ALLISON: Note an exception.

Mr. MARSHALL: Now you may state as far as you know in your experience in railroading what has been the custom — as far as your knowledge leads you what has been the custom on long tracks and numbers of tracks as to the use of the blocked or unblocked frog?
A. The custom as far as I know it has not been used.
Q. As far as you know the unblocked frog is used?
A. Yes, sir.
Q. Now, Mr. Hart, I believe you have stated how far your experience has gone in that matter, and what your means of knowledge has been. You have worked a number of years on the New York Central and Hudson River railroad?
A. Yes, sir.
—. ——.
A. And have never seen a block frog used.

117 Q. There is more or less danger in either frog, is there not, Mr. Hart, either the blocked or the unblocked?

A. There is danger in them as well as in other frogs, that are not blocked.

Q. They are more or less dangerous?

A. Yes, sir.

Mr. KIMBALL: I move to strike that out as immaterial and incompetent testimony.

The COURT: Yesterday it was shown by their witness that he had had no experience with the block frog; that was ruled out.

Cross-examination.

Examined by Mr. KIMBALL:

Q. When did you work on the New York and Hudson Central railroad?

A. Thirteen years ago.

Q. How long have you worked on the Southern Pacific?

A. Six years.

Q. Where did you work after you left the New York Central and Hudson River?

A. I worked for the Southern Pacific eleven years altogether.

Q. Then you have worked for the Southern Pacific almost ever since you left the New York Central?

A. Yes, pretty much.

Q. And your railroad experience has been on those two systems?

A. Yes, sir.

118 Q. And no other?

A. No, sir; I never worked for any other company only these two.

Q. Do you know whether the use of the block frog or the safety block in frogs has come in vogue on any road?

A. No; I don't know whether it has or not.

Q. How long ago since you first learned that such a thing as a safety block was used on a frog?

Mr. MARSHALL: We object. He is asking for when he learned that was used on some system.

The COURT: I think that is all right.

Mr. MARSHALL: We withdraw the objection.

A. About two years.

Redirect Examination.

Examined by Mr. MARSHALL:

The WITNESS: I think I can explain about that cast frog.

Q. You may explain about it.

A. There is this bend here and the point is eight inches. In here are two rails come up here and they are three inches on the top which would take up six inches of the eight and leave a space in

there about two inches. A cast frog has got to be blocked as well as a fixed rail frog.

Mr. MARSHALL: They both require a block?

A. Yes, sir.

The COURT to the witness: The cast frog is simply an iron wedge and then the rails fitted into that?

119 A. Yes, sir.

Mr. KIMBALL: I now offer in evidence the table known as the "Carliss expectation." Table as found in the 1st volume of the Encyclopedia Brittan-ica, 9th edition, page 177, of the title insurance, being the second column table in the list of tables number two, and entitled "Tables showing the expectation of life, or mean after life of persons aged twenty, thirty, etc., according to the said mortality table." I offer this in evidence as a book of science and a published table of general notoriety and interest under section 1190 of our Statutes of the Code of Civil Procedure.

Mr. MARSHALL: My objection is this: It is not shown to be one of the most general use. We object here. The foundation has not been laid showing that this is accepted among actuaries in insurance offices as reliable and as authority, and until that foundation is laid the fact that it is published in an Encyclopedia Brittan-ica does not make it competent testimony. It is not a matter of general notoriety or general interest, and does not come under the *pervue* of the statutes.

The COURT: My judgment rather inclines to receive it, but I am doubtful whether there shouldn't be some preliminary proof.

WILLIAM H. CAMPBELL, being called for the plaintiff, being duly sworn, testifies as follows:

Examined by Mr. KIMBALL:

Q. What is your name?

120 A. W. H. Campbell.

Q. Where do you live?

A. In Ogden.

Q. What is your business?

A. Insurance.

Q. What character of insurance?

A. Life and fire.

Q. How long have you been engaged in the life insurance business and in what capacity?

A. About two years as solicitor; as agent for the Mutual Life Insurance Company of New York.

Q. How old is that company?

A. About 47.

Mr. MARSHALL: Do you know of your own knowledge——

Mr. KIMBALL: How long have you known of that company?

A. Almost all my life.

Q. How long would that be?

A. I am about 31 years of age.

Q. You have known of it almost all your life?
A. Yes, sir.
Q. You have been engaged for it in business as agent for the past two years?
A. Yes, sir.
Q. In your capacity for life insurance companies, state if you have had occasion to use mortality tables or mortuary tables.
121 A. Yes, sir. We use mortality tables. In fact, that is the table upon which the whole business of life insurance is based.
Q. What mortuary table does your insurance company use; if any?
A. The Mutual Life uses the American.
Q. How long has that table been in use by the Mutual Life Insurance Company?
A. I think the table was constructed in the neighborhood of 1850, but not by the Mutual Life Insurance Company.
Q. Has it been used by you the last two years as their agent?
A. Yes, sir.
Q. What other mortuary tables are there?
A. There are what are called actuaries and Carliles; there may be others.
Q. But you know of the actuaries and Carliles?
A. Yes, sir.
Q. How long have you known of the Carlile tables?
A. Well, for several years.
Q. From your experience can you state whether the Carlile table is one that has been in general use?

Mr. ROYLE: We object. He hasn't had any practice in that.
The COURT: It isn't expected he has had practice under any of these tables; he doesn't pretend having compiled any of these tables.
Mr. ROYLE: We object. He has not been shown to be an expert and has no right to give an opinion.
122 The COURT: He has given testimony tending to show he is.
Mr. ROYLE: Exception.
Mr. KIMBALL: Well, you can answer the question.

A. Well, I can't answer the question positively, although I think the Carlile tables are universally in use, but I don't know whether it is used by life insurance companies or not.
Q. Can you state whether or not the Carlile table is a standard mortuary table?

Mr. ROYLE: Same objection.
The COURT: Same ruling.
Mr. ROYLE: I have no objection to asking the witness if he knows anything about it.

A. I believe it is regarded as a standard.
Mr. ROYLE: Answer if you know.

A. No, sir. I don't.

Mr. KIMBALL: You say you have been engaged in the insurance business two years?

A. Yes, sir.

Q. And in the progress of that business you may state whether or not you have had occasion to come in acquaintance with the mortuary tables and their use.

A. Yes, sir.

Q. And have made some study of the subject?

A. Yes, sir.

Q. Well, from your observation can you tell whether the Carlile table is a standard table or not?

123 Mr. ROYLE: We ask leave to cross-examine to see if he is an expert before they proceed.

The COURT: I think he has stated enough for his asking him upon the various subjects.

Mr. ROYLE: Let him answer that.

A. No.

Mr. KIMBALL: I ask you here if from your experience you know whether it is a standard table or not?

A. I never had any occasion to use the Carlile table.

Mr. KIMBALL: I didn't ask you that.

The COURT: He means to say he has never had occasion to examine that question.

A. WITNESS: I know this: That the difference between any tables——

Mr. KIMBALL: Have you compared them?

A. Yes, sir.

Q. Well, then you may state whether or not the American table or not.

A. Yes, sir; I know that is a standard table.

Q. Have you an American mortuary table in your possession?

A. Yes, sir.

Q. Can you produce it?

Mr. KIMBALL: I now offer to introduce this American mortuary table to show the expectancy of life of a man 41 years of age of good health, and as this is Mr. Campbell's private book, I make the offer of the book and ask the gentlemen to consent it may be inserted in the reporter's notes.

124 Mr. MARSHALL: We object. Proper foundation for the introduction of this table has not been made.

The COURT: It may be admitted.

Mr. MARSHALL: We except.

Mr. MARSHALL: Let the witness read that and the reporter take it down.

Mr. KIMBALL: You may read from the American table of expectation of life of a man 41 years of age.

The WITNESS: Expectancy of life of a man 41 years of age is twenty-seven and forty-five one-hundredth years.

The above and foregoing was all the evidence given in this cause.

Instructions. Hon. H. P. Henderson, Judge.

GENTLEMEN: This is an action brought by the plaintiff in this case, Mrs. Isabella Seley, to recover for damages which she alleges has been occasioned by the negligence of the defendant in this case by which her husband came to his death. You have heard the complaint and the answer to it read, and it is unnecessary to read it again at length. It says in substance that her husband was in the employ of the defendant company, and that on a certain day in July two years ago, while he was in the State of Nevada, and while he was in the performance of his duty as an employé of the company, on account of the negligent construction of the track, that he met with injuries that occasioned his death, and she
125 claims that she is entitled to damages for it. The claim is, that the death having taken place in the State of Nevada, that by the law of that State the action survives in her favor. At the common law and without any statute, if a person is injured by the negligence and carelessness of another, or by the wrongful act of another, only the injured person could recover damages for it, but if the injury was so severe that it caused death, then there was no action for damages because there was nobody to bring the action: it did not survive in favor of any one; but by the statute of Nevada it is provided that the action shall survive in favor of the legal representative of the deceased; so that if a death takes place by the wrongful act of another, of any person, company or corporation, in the State of Nevada, the representative of that person, his administrator or administratrix, would have the right to recover damages to the family of the deceased.

The statutes of Nevada have been read in your hearing and due proof has been made that it is the statute of Nevada, and it is unnecessary to call your attention to that farther. It provides, in substance, that whenever a death shall be caused by the wrongful act, neglect or default, and the act, neglect or default, is such as would, if death had not ensued, have entitled the person to maintain an action and recover damages in respect thereto, then the person, company or corporation shall be liable to an action for damages notwithstanding the death of the person injured; and that law further provides that the personal representative may bring an
126 action, and it provides also for damages, to which I will call attention hereafter.

In this case, before the plaintiff can recover, she must establish certain propositions by a preponderance of the evidence; the facts must all be established by a preponderance of the evidence or they must be admitted, and I call attention specifically to the propositions which must be established.

First. That the plaintiff is the widow of William H. Seley.

Second. That at the time the accident is claimed to have occurred the deceased was in the employ of the defendant and was in the discharge of his duty as employé.

Third. That the frogs of defendant's railroad at the place claimed

was imperfectly and negligently constructed and *was* on account thereof dangerous to employés, and that the defendant thereby neglected the duty it owed to the deceased.

Fourth. That by reason of such defect plaintiff's husband was killed.

Fifth. That the deceased did not contribute by his own carelessness or negligence to the injury resulting in his death.

Sixth. That such accident and death occurred in the State of Nevada.

Seventh. That the plaintiff has been appointed and is administratrix of William H. Seley, deceased.

Eighth. The damages.

127 Each and every one of these propositions the plaintiff must establish by a preponderance of the evidence, and not until she establishes it by a preponderance of the evidence is she entitled to recover.

With reference to the first proposition, that the plaintiff is the widow of William H. Seley, that fact was alleged by the complaint and was not denied by the answer, so it stands admitted and you will therefore have no further difficulty with that.

As to the second, that he was in the employ of the defendant, was in the discharge of his duty as employé, that fact must be shown here, and so far as the fact that he was in the employ of the defendant, do not understand that it is denied by the defendant, but the further proposition that at the time of the injury he was in the discharge of his duty as employé, is denied and presents an issue in this case. You must find that fact from the evidence, and it must be established by the plaintiff by a preponderance of the testimony. It is claimed in this case on the part of plaintiff that he was employed as conductor at the time of the accident; that he had charge of the train; that under him were two brakemen, who were employés under his charge; and that it was his duty to get his train over the road in pursuance of the printed instructions and time schedule of the road; and that it was his duty in doing that to act with the people under his charge, brakemen, as they are called, as

128 coemployés with him and not only direct their actions, but to act with them in the discharge of their duties, both as a boss or foreman and as a workman with them in the discharge of those duties. That is the claim of the plaintiff, and if that be the fact, and the evidence in this case shows it by a preponderance of the testimony, then of course it would establish the fact that if it was the duty of the men under his control to make couplings between cars, it would also be in the line of his duty to do so. On the other hand it is claimed by the defendant here that it was only his duty to manipulate the running of the train and act as a foreman over these other men and direct them to do the actual labor of the train, except there might be some great emergency which called for him to act. Now, as to which of these claims is correct, is wholly a question of fact for you to determine. If it was not within the line of his employment at all, for instance, as if the superintendent of a railroad company who was employed by the

company for the purpose of managing its business or the attorney, like Mr. Marshall, who is retained to see after its legal business, should volunteer to go down to the railroad and undertake to couple cars and he should meet with an accident, he could not recover for damages. But if, on the other hand, a person is employed on the railroad to do a certain piece of work and it becomes necessary in order that he may do it that he should take hold and help do a part of the work himself, and that is expected, and that is part of the employment for which he is hired by the company and he does that, it is within the
129 duties for which he is employed, and if this man was employed with the understanding that he would not only direct the movements of men under his charge, but that he would assist them in all proper ways, directing them to do work, and also taking hold and assisting generally, and the coupling of cars if within their duty, would also be within his duty, and the company would not be excused simply because the overseer saw the place of danger, and it was the duty of the employé to step and do it, simply because he did it, I say, they would not be released from their obligations to him and to respond to him in damages. That is the first question, as I have divided them, for you to determine. Was he in the performance of his duty as employé? If he was, then you proceed to the other questions in the case. If he was not, but stepped in there voluntarily and rashly to make that coupling, then, if he was injured, it is his loss and a calamity for which nobody can recover from this defendant, and that would end the deliberations in this case, and a verdict should be returned for the defendant.

But, finding that question in favor of the plaintiff, then you will proceed to the third, and that is the third thing that must be found in favor of the plaintiff before she can recover, and that is, that the frogs of defendant's road at the place mentioned was imperfectly and negligently constructed and on account thereof dangerous to employés, and that defendant thereby violated a duty it owed
130 to the deceased. In order to find this proposition in favor of the plaintiff you must find that in the construction of these frogs—and it has been so fully explained in the evidence what they mean by frogs that further explanation by me is unnecessary—it must be shown that in the construction of these frogs, and the putting of them down and the operating them as this company did, that they were guilty of negligence and a violation of the duty they owed to the deceased, who met his death by reason of that. Negligence, gentlemen, is the failure to perform the duty that is incumbent upon a person, or to speak more correctly, negligence is the absence of care according to the circumstances. It is a relative term. It might be negligence to a certain thing under one set of circumstances and might be the use of ordinary and proper care under other circumstance-. So that to determine the question of negligence is always to take into consideration all the surrounding facts and circumstances; and they should be considered in this case, and you must determine in this case whether it was negligence on the part of the company to make use of this kind of frog they were using and

without blocking them, as claimed here by the plaintiff. One who is engaged in the employment of another for the performance of certain duties for a compensation takes upon himself the natural and ordinary risks incident to the service, and the pay is presumed to be a reasonable compensation for the risks. That is true even
131 though the employment is extra dangerous and hazardous. If a person be employed by another to work in a powder mill he must take the ordinary and necessary dangers that accompany that employment. A person is employed by another to travel, for instance, in Central America and sell goods and the pay is in accordance with the contract and a person goes there to sell goods and on account of the rigors of the climate he is taken sick and dies. That is the loss of the person himself and of his representative. Nobody can recover for that because it is part of the contract, it is a risk included within the contract he makes.

It is the duty of the master not to expose the servant in performing his duties to hazzards or perils which may be guarded against by proper diligence. It is his duty to observe all the care which prudence and caution require and to provide reasonably safe and prudent instrumentalities to avoid danger. He is not required to furnish the safest and latest appliances, but such as are usual and reasonable under the particular circumstance and exigencies, and this is part of the contract of hire on the part of the master. Now a master, or a railroad company, or a person who employs another to enter their service, does not guarantee to them that they will not be injured, but they do guarantee, and it is their duty to furnish, reasonably safe appliances for the purpose of performing the duties they are hired to perform. They are not required to have the safest
132 known appliances and to make them absolutely safe; they only engage they shall be reasonably safe. The degree of care they must exercise is that of reasonable care in procuring proper appliances to perform the duties the other is hired to perform, and if they neglect that duty that is negligence on their part, and if a person by reason of that negligence—if you can trace it to that cause—is injured thereby then they are liable unless the plaintiff is guilty of tributory negligence.

Now that, gentlemen, is the question in this case for you to determine under the circumstances. Was it negligence on the part of the company to make use of the kind of frogs that the testimony in this case shows they did use, and it is not of itself negligence to simply show they used that kind of frogs, but the testimony must show further that they were dangerous and that the danger could have been avoided by the exercise of reasonable care and prudence on the part of the railroad company; that it was their duty to block them so that brakemen would not be injured by it. If they did not do that they violated a duty that was fairly within the contract between these parties when they made the contract for service, but if they did do that—if they did do what was required by ordinary care and prudence in putting down these frogs—then that would end the case wholly, even though you have found all preceding propositions in favor of the plaintiff. If you fail to find that

by prudence they could have averted the accident, you can stop all further deliberations and return a verdict in favor of the de-
133 fendant. You should take into consideration the testimony that bears upon it, the testimony that has been given here by practical railroad men of what are the effects of these frogs, their liability to danger, with and without filling, and determine it from all this evidence.

The fourth proposition is, that by reason of such defect the plaintiff's husband was killed. After you have found all the others you must come to this proposition and if you find that the company was not negligent, if you can trace this accident to any other cause than that of negligence, then that would defeat a recovery in this case—that is, if it was rashness on the part of the deceased—if he volunteered to go in there when he ought not to, if he was in any way careless about it and took risks he ought not to have taken—indeed the testimony must show affirmatively by a preponderance of the evidence that on account of that defect he was killed, and though you find all others in favor of the plaintiff, when you reach this one, if the testimony will not thoroughly and reasonably trace his death to that cause then you can stop at once and not consider anything further in this case and return a verdict in favor of the defendant.

If you find these in favor of the plaintiff you will proceed to the fifth proposition—that the deceased did not contribute by his own carelessness or negligence to the injuries resulting in his death. It is a principle of law, that if a person be injured, no matter what the carelessness of the party injuring him may be, if he has
134 himself contributed to that by his own carelessness or heedlessness then he cannot recover. The law will not permit him to apportion the responsibility under such circumstances but will simply say that the party thus injured must bear the responsibility. In this case if you find that the deceased recklessly or heedlessly met with this accident and that he contributed to it, that will end this case in favor of the defendant, and you should return a verdict in its favor. It is the duty of the employé or of any person to use all their faculties and all their senses to avoid danger. It was the duty of this employé to make usé of all the facilities that he had to see what danger he was about to encounter. He should use all the knowledge he had as to the way this road was constructed, what the instrumentalities were with which he was doing business, and you should consider all these things in determining whether this man contributed, himself, to his injury. You should also consider the fact as to what he was engaged in at the time, how much that would engage his attention, and from all these things taking into consideration all the circumstances of the case was he rash and was it careless and heedless on the part of this man to undertake to do what he was doing at that time, if so, this case should end in favor of the defendant.

In determining that you should take into consideration what his knowledge was of the way this track was constructed; you should

take into account what was said to him at the time, and if
135 any warning was given him by his co-laborers, and in view of all the circumstances, determine whether this man heard it or knew of it; consider it all, take it into consideration as reasonable men, and if you cannot find that he was free from negligence himself in stepping in there; if it was rashly done, or carelessly done, on his part, the plaintiff cannot recover in this case, but it should end in favor of the defendant; but if under all the circumstances, considering what his duty was, considering the circumstances under which he was doing it; in view of the care and responsibility that was charged upon him by his principals, if it was reasonable he should undertake to make that coupling, or do what he did do there and met with this accident without his fault, then of course that requirement is fulfilled in favor of the plaintiff and you will pass to the next question.

The sixth, that such accident and death occurred in the State of Nevada, but I believe that is not denied. It is pleaded in the complaint and not denied in the answer, and so that must be taken to be true.

The seventh, that the plaintiff has been appointed and is now administratrix of the estate of Wm. H. Seley. I believe that is alleged in the complaint and is not denied, so that is taken to be admitted.

Now, gentlemen, those are the propositions that the testimony on the part of the plaintiff must show affirmatively before she can recover in this case, and if you should find any one of these
136 in favor of the defendant then your duties will end, and you will return a verdict in favor of the defendant. But if you find all these propositions in favor of the plaintiff you will come to the next proposition you are to consider here, and these are matters of defense set up by the defendant. He alleges and claims that the deceased was guilty of contributory negligence himself; he alleges that affirmatively. I have already told you that the testimony on the part of the plaintiff must show affirmatively that the deceased was free from negligence himself, and that if the testimony on the part of the plaintiff should show that he himself was guilty of negligence and carelessness and want of care, that then the plaintiff could not recover, but I now come to state that as an affirmative defense. Unless the testimony on the part of the plaintiff shows that, it becomes a matter of defense only and it is for the defendant to show it by a preponderance of the evidence. They must assume the responsibility and the burden of proving that fact. It is alleged and claimed in this case on the part of the defense, that if this frog was defective at all; if it was a defectively constructed road, that this deceased knew it and understood it; that he entered into the employment of the company with that understanding and that it was part of the contract between them that he assumed all the risks that went with that employment, and that if he stayed in the employ of the company after knowing of this defect himself; if he stayed in their employ without complaints and understood it,
137 that then he was guilty of contributory negligence himself,

and must assume the risks that go with this defectively constructed road, and that the plaintiff cannot recover.

Now, in relation to that, if this track was defectively constructed in the manner that I have called attention to—that is, defectively constructed frogs, no fillings in the point of the "V" and the opening between the rails—if that was true and the deceased knew it, it would impose upon him greater care as I have already told you and if he knew that, if he knew of the danger that that would bring to him or was likely to come to him, if he understood that, if he came to fully realize that, that *that* it was dangerous to life and might occasion to him great bodily injury or cause his death and he continued in the employ of the company after that time without complaint, then he was assuming that risk; but it does not prevent a person from recovering simply because he may know that the instrumentalities are defective; he may know that and not be negligent or guilty of contributory negligence in staying with the company after that is known. But in addition to his knowing it was defectively constructed he must know and appreciate and understand its dangerous character and the danger it threatens to him; he must know and understand that before he can be charged with contributory negligence in staying with the company after understanding that. You must remember that it is negligence that is being claimed on the part of the deceased now, and negligence in this sense means just what it does when you are considering
138 it in relation to the defendant. It is want of proper care, just as I explained it to you before. Negligence is the absence of care according to the circumstances. Now if this man knew about the construction of that railroad, and if he knew the dangerous character of it and how liable it was to hurt him and he continued in that employment then he cannot recover because that was negligence for him to stay with the company that used defective appliances. But while the appliance was defective, if it was not so plainly defective and so plainly threatening to his safety and the safety of the other employés and he did not believe and could not have known and did not know but that he might still perform his duties without injury. If a reasonable man might have come to that conclusion, then it would not be contributory negligence in him to remain with it. You should determine this principle of contributory negligence from this basis and determine whether that man was guilty of contributory negligence, and whether as a matter of fact he assumed the risk of the defective construction and if so that would be a bar to recovery on the principle I have just explained;—if you find him guilty of contributory negligence under that principle no matter that you may have found all these other questions in favor of the plaintiff, no matter how negligent the defendant may have been in the defective construction of their road, you should end this case by returning a verdict in favor of the defendant.

139 I now call your attention to the requests that have been handed in and I do so at this time because I have intended to cover these in the charge in general, but counsel has called my

attention to these principles in this language and they have asked that the jury be instructed accordingly and so I call your attention to them now.

The defendant asks the court to instruct you as follows:

The jury are instructed that the law does not require employers to adopt the latest improvements, nor does the relation of the employé and employer involve a guarantee by the employer of the employé's safety when an employé works with machinery insufficient or for any reason unsafe with their knowledge or means of knowledge of its condition and knew or might have known of the danger of the employment to himself, then he takes the risk incident to the employment in which he was then engaged and cannot maintain an action for injuries sustained arising out of the accidents resulting from such defective condition of the machinery. If therefore you believe in the evidence that Conductor Seley from his long employment on the road of defendant had knowledge of the construction and use of the frog where he was killed and of the danger incident to the use thereof to himself and made no objections thereto but continued in the employment of the defendant in full knowledge there-, and by reason of such defection he lost his life, you will find for the defendant. I apprehend that substantially that part
140 I have before told you. You understand it was not enough to charge a person absolutely with contributory negligence so as to cut off his right to recover, that he may know that the machinery is defective; he may know that and continue the use of it and still recover, but if he knows of the danger to himself; if he appreciates that and understands fully the danger that brings to him and he lost his life from that, and then it would bar his right to recover. Now in that connection the plaintiff asks me to charge you as follows, and as I understand it *this*, it is a statem- of the same principle stated a little differently:

Plaintiff's Requests for Instructions.

I.

"Defendant claims William H. Seley, plaintiff's intestate, was an experienced freight conductor and had been in the employ of the defendant company for a number of years and actually knew or by the exercise of ordinary care could have known that the switch frog where he received the injury resulting in his death, was not blocked; and if the same was in a dangerous condition actually knew or by the exercise of ordinary care could have known its dangerous condition prior to the time of his injury; and that by remaining in defendant's employment thereafter without protest or promise of amendment of the defect if the frog was defective, he assumed such risk and waived any right to recover for injuries caused thereby.

141 Upon this question you are instructed that said Seley by entering into and remaining in defendant's service assumed only the ordinary risks directly connected with his immediate employment al-

though you may find that it was a part of that employment and his duty under it to couple and uncouple cars on the track in doing the work of his train and did not assume any risk or danger resulting from a defective or dangerous track or frog, unless prior to the time of his injury he actually knew or by use of reasonable and ordinary care under all of the circumstances should have known that the particular frog where he was injured—if you find he was injured at a frog—was in a defective or dangerous condition, and knew or could have known by the use of ordinary care under the circumstances in which he was placed, of the danger and risk to himself from it in doing the service engaged in by him at the time he received his injury."

Now, gentlemen, while these requests state the rule a little differently and call attention to the matter in a different way, substantially they are a statement of the same rule I have already given you. I have undertaken to draw a distinction which though somewhat confusing even for the attorneys and probably more so for jurors yet by the use of care and attention I think you will observe the distinction that I have undertaken to make.

The defendant further asks the court to charge you as follows:

142 "If the jury find from the evidence that the deceased knew or had means of knowledge of the unblocked frog and the danger to himself therefrom and with such knowledge continued in the defendant's employ and accidentally got his foot caught in said frog and was killed, then as a matter of law the jury are instructed that said death resulted from a risk incident to the employment and assumed by the deceased in his employment and gives no right of action to the plaintiff."

That, gentlemen, is simply another statement of the same principle. If you find from the evidence that the deceased knew or had means of knowledge, that he had knowledge of the unblocked frog and of the danger to himself therefrom, he must have understood both is the point I call your attention to particular-. When a conductor assumes as his duty coupling and uncoupling cars he assumes the risks incident thereto. Of course if he assumes duties of a brakeman and undertakes to do their duty he assumes that risk, and he assumes the risk fairly incident thereto, that is, such risks as the employer has a right to ask that any employés shall take.

"The jury are instructed that if they find deceased was employed as conductor for defendant, and that it was not the duty of deceased as such conductor with competents furnished by defendant right at hand ready and willing to couple cars, then the said deceased

143 assumed the danger of a brakeman's employment and plaintiff cannot recover."

I have already instructed you if this man volunteered something outside of his duty he cannot recover.

"The jury are instructed that if they find from the evidence that deceased was warned and his attention at the time directly called to the danger in the frog and that he immediately after such warning

heedlessly or carelessly placed his foot therein and by reason thereof was killed, then the jury must find for the defendant."

I have fully stated that to you before.

"The jury are instructed that if they find from the evidence that the negligence or heedlessness of deceased contributed to the accident then the plaintiff cannot recover and the verdict should be for the defendant, 'No cause of action.'"

On the part of the plaintiff: "If you find from the evidence that Mr. Seley when injured was in performance of his duty imposed upon him by his employment and that the frog where he received his injury was unblocked and had been for some time to the knowledge of the defendant, and that it was negligence on the part of the defendant to leave it in this condition, then your verdict must be for the plaintiff, unless the danger from it was so obvious and immediate that a man of common prudence would refuse to use it."

That is substantially true with this modification, that, if
144 under all the circumstances a reasonable man knowing that that track was in the condition that it was in or would naturally have known of the danger and a prudent man would have refused to continue in the employment of the company then that would take away his right of recovery. If it could not be seen; if the peril would not be apparent from an inspection, it does not take away his right, or if it could be and he fully knew of the danger that came with that employment to himself it would take away the right to recover. It is a fair question of negligence. I have before instructed you upon that fully.

If you find all these questions in favor of the plaintiff you will come to the question of damages. You will then consider how much damages this plaintiff should recover, and the statute of Nevada, where this injury took place, provides in relation to damages as follows: Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

The proceeds of any judgment obtained in any action brought under the provisions of this act shall not be liable for any
145 debt of the dec-ased; provided, he or she shall have left a husband, wife, child, father, mother, brother, sister or child or children of a deceased child, but shall be distributed as follows:

First, if there be a surviving husband or wife and no child then to such husband or wife, if there be a surviving husband or wife and a child or children or grandchilden, then equally to each, the grandchild or children taking by right of representation; if there be no husband or wife, but a child or children or grandchild or grandchildren, then to such child or children and grandchild or children by right of representation, if there be no child or grandchild, then

to a surviving brother or sister or brothers or sisters if there be any; if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons provided every such action shall be brought by and in the name of the personal representative or representatives of such deceased person and provided, further, the jury in every such action may give such damages pecuniary and exemplary as they shall deem fair and just and may take into consideration the pecuniary injury resulting from such death to the kindred as herein named.

And provides further that the jury in such action may give such damages, exemplary damages, as they shall deem fair and just and may take into consideration the pecuniary consideration re-
146 sulting from such death or injury as appear reasonable. I see by these statutes that you may take into consideration the pecuniary injury resulting from such death, to the kindred therein stated, to the wife and children of the deceased. The complaint in this case alleges that the plaintiff is the widow and it is alleged that there is now surviving him not only his widow but three children —— ——, aged fourteen, William K. aged nine years and John W. aged three years. This allegation of the complaint is not denied though it stands admitted that that was the family that he left.

And now, gentlemen, you should consider the pecuniary damages to these parties. What pecuniary damage they have suffered on account of the death of this husband and father, not what they suffered in their minds, not the pain and anguish they suffered. I do not think the statute intends to give such a remedy, but it is intended for the relief of parties under such circumstances as are shown here if it is found to be negative, and they are entitled to recover, but that is a question for the jury. The facts are to be put in the possession of the jury so far as it is possible of the injury resulting from the death of the father. You are to take into consideration the age of the father, his ability to earn wages and provide for them; the amount of wages that he was receiving, and from all these facts you are to determine how much money placed in the hands of this family will compensate them, that is,
147 assist them in maintaining the family as he would have done as nearly as you can, taking into consideration only the pecuniary loss and nothing else. No mental suffering, no distress of mind, no loss of associations as husband or father, but the means he was able to put them in possession of. You are to regard this purely as a practical question, so far as you can and render a judgment for that and only for that, and when you have determined that, that should be the amount of your verdict in this case.

Considerable has been said during the argument of this case about the determination of this class of cases. I am wholly satisfied it is unnecessary even to mention such a subject because I do not believe that any intelligent jury, and such a jury I see before me now, would determine this case upon any different principle than they would if it was a case between two individuals, and of course it is unneces-

sary for me to say that in the questions in this case of negligence and contributory negligence and damage the questions are all to be considered just as though this action stood between two individuals and in no other sense whatever; just as though the railroad company here was an individual, and as though the plaintiff was an individual, without regard to wealth or corporate rights or distinctions in any manner whatever, simply to discharge your duties here in determining these facts and you are to forget while you are determining the question of negligence and of contributory
148 negligence, forget who the plaintiff is and who the defendant is and determine it purely and simply as a question of fact and nothing else, and when you come to determine the damages in this case you should only so far consider the situation and character of the parties to the transaction as is necessary, and you should return a verdict that would be simply your judgment and not your passion.

Gentlemen, the statute requires that I say to you that you are the sole judges of the facts in this case and of the weight of the testimony and of the credibilty of the witnesses. That means a good deal. You are the sole judges. You are not to take anybody else's judgment whatever, about anything, not even the court's nor anybody else's about the facts. You are not bound to believe the testimony of the witness simply because he takes the stand and testifies. You are bound to believe only what you actually do believe. You can believe the testimony of one witness as against a number of witneses, if you believe it to be true. It is only a question whether you shall take the testimony to be true or not.

Mr. MARSHALL: I desire to enter an exception to all the requests asked by the plaintiff and given by the court, and also an exception to the instruction given by the court on its own motion and also to the requests asked by the defendant and refused by the court. Defendant also excepts to the requests asked by the defendant and modified by the court.

149 Mr. KIMBALL: We except to each of the instructions given by the court at the request of the defendant. We except to the refusal of the court to give the third and fourth instructions asked by the plaintiff. We except to the refusal of the court to give the second instruction as asked. We except to the giving by the court of the second instru-tion asked by the plaintiff as modified by the court, and we except to each of the instruc-ions given by the court on its own motion.

The above and foregoing are all the instructions given by the court to the jury in said action and the same were given in the form and order above set forth.

The defendant requested the said court to give to the said jury certain other instructions which were reduced to writing and numbered respectively and were in the form and language following, to wit:

First.

The jury are instructed on the law of this case, to find their verdict for the defendant; "no cause of action."

Second.

The jury are instructed that the law does not require employers to adopt the latest improvements, nor does the relation of employer and employé involve a guarantee by the employer of the employé's safety. When an employee works with machine-y insufficient
150 or for any reason unsafe with a knowledge or means of knowledge of its condition and knew or might have known of the danger of the employment to himself, then he takes the risk incident to the employment in which he is then engaged and cannot maintain an action for injuries sustained arising out of accidents resulting from such defective condition of the machinery; if therefore you believe from the evidence that Conductor Seley, from his long employment on the road of defendant, had knowledge of the construction and use of the frog where he was killed, and of the danger incident to the use thereof to himself or made no objection thereto but continued in the employment of defendant with full knowledge thereof and by reason of the use of said frog he lost his life, you will find for defendant.

Third.

The jury are instructed that if they find from the evidence that the railroad companies use both the blocked and unblocked frog and that it is questionable which is the safest or the most suitable for the business of the roads, then the use of the unblocked frog is not negligence and the jury are instructed not to impart the same as negligence to the defendant, and they should find for the defendant.

Fourth.

151 If the jury find from the evidence that the deceased knew or had means of knowledge of the unblocked frog and the danger to himself therefrom, and with such knowledge or means of knowledge continued in defendant's employ and accident-ly got his foot caught in such frog and was killed, then as a matter of law the jury are instructed that said death resulted from a risk incident to the employment and assumed by deceased with his employment and gives no right of action to plaintiff.

Fifth.

The jury are instructed that when a conductor assumes the duties of coupling or uncoupling cars, he assumes the risk incident thereto.

Sixth.

The jury are instructed that if they find that deceased was employed as a conductor for defendant and that it was not the duty of deceased as such conductor with competent brakemen furnished by defendant right at hand ready and willing to couple cars, then the said deceased assumed the dangers of the brakeman's employment, plaintiff cannot recover.

Seventh.

The jury are instructed that railroad companies are not required to use the latest or best appliances in their business or machinery that is absolutely safe, and if the jury find from the evidence that the unblocked frog is generally used or even frequently used
152 by railroads, then the use of such frog is not negligence of the defendant and the defendant is not liable for an accident arising therefrom.

But the court refused to give the said instructions so asked by the said defendant and each of them, to which refusal the defendant then and there excepted.

And on the 6th day of March, A. D., 1889, the jury in said cause returned a verdict in favor of the plaintiff for the sum of seven thousand five hundred dollars, and on the same day judgment was entered thereon for the said sum and costs taxed at $—.

And thereupon defendant was allowed by the court ninety days to prepare, file and serve notice of motion and statement on motion for a new trial.

Assignment of Errors.

The defendant now assigns the following errors and grounds for a new trial, to wit:

First.

Insufficiency of the evidence to justify the verdict and the same is against law in this, to wit:

a. It fails to show any fault or negligence on the part of the defendant.

b. It shows contributory negligenee on the part of plaintiff's intestate.

c. It shows that the deceased entered into the employ of
153 defendant some thirteen years prior to the accident and continued in such employ during all said period, knowing the character of the frog used by defendant in its entire system, and thereby accepted the risk thereof with his employment.

Second.

Errors in law occurring at the trial and excepted to by the defendant, as follows, to wit:

a. The court erred in overruling defendant's motion for a nonsuit.

b. The court erred in overruling defendant's objection to the question asked by plaintiff of the witness Hardy, in reference to his fellow-brakeman. Q.: "What experience had he had, if any, in railroading if you know?" and in permitting said witness to answer the same.

c. The court erred in giving the instructions given on his own motion, and in giving each distinct part thereof.

d. The court erred in giving the instructions asked by the plaintiff, and in giving any or either of them.

e. The court erred in refusing to give the instructions numbered 1, 2, 3, 4, 5, 6 and 7, as asked by the defendant, and in refusing to give each of the same respectively, and each separate and distinct part of said instructions as requested.

MARSHALL & ROYLE,
Attorneys for Defendant.

154 It is hereby certified that the foregoing is a full, true and correct transcript of the record and proceedings in this case.

E. M. ALLISON, JR.,
KIMBALL & WHITE,
Attorneys for Plaintiff.

Dated April 25, 1889.

The foregoing statement on motion for a new trial herein, is hereby settled and allowed, and made part of the records herein.

HENRY P. HENDERSON, *Judge.*

Dated April 25, 1889.

(Endorsed:) Title of court and cause. Filed April 26, 1889. H. H. Henderson, clerk, by A. H. Drake, deputy clerk. Served on us the 24th day of April, 1889. E. M. Allison, Jr., Kimball & White, attorneys for plaintiff.

155 ISABELLA SELEY, Administratrix, etc., *vs.* THE SOUTHERN PACIFIC COMPANY. } Order Overruling Motion for a New Trial.

In this cause the motion for a new trial having been heretofore argued and taken under advisement by the court, now comes the court, and being fully advised in the premises, orders that said motion be and the same is hereby overruled and denied.

Done in open court June 1st, 1889.

H. P. HENDERSON, *Judge.*

In the District Court of the First Judicial —, Territory of Utah, County of Weber.

(Title of the Court and Cause.)

Notice of Appeal.

To the plaintiff and to E. M. Allison, Jr., and Messrs. Kimball & White, her attorneys:

156 Take notice that the defendant in the above-entitled action hereby appeals to the supreme court of said Territory from the judgment therein rendered and entered in the said district court on the 6th day of March, 1889, in favor of the plaintiff

and against the said defendant, and from the whole thereof; and also that the defendant hereby appeals to said supreme court from the order of said district court made and entered on the 1st day of June, 1889, denying the said defendant's motion for a new trial and refusing a new trial therein.

MARSHALL & ROYLE,
Attorneys for Defendant.

June 8th, 1889.

(Endorsed:) (Title of the court and cause.) Notice of appeal. Copy hereof served on us this 10th day of June, 1889. Kimball & White, E. M. Allison, Jr., attorneys for plaintiff. Filed June 11th, 1889. H. H. Henderson, clerk.

TERRITORY OF UTAH, } ss:
County of Weber, }

I, H. H. Henderson, clerk of the district court, of the first judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true and correct copy of the judgment-roll, notice
157 of intention to move for a new trial, order extending time to file statement on motion for a new trial, statement of case, order overruling motion for a new trial, notice of appeal, in the hereinabove-entitled action.

And I further certify that an undertaking on appeal in due form has been properly filed in my office.

Witness my hand and the seal of said court this 2d day of July, 1889.

{ Seal United States of America, Territory of Utah, 1st Judicial District. }

H. H. HENDERSON, *Clerk.*

158 In the Supreme Court of Utah Territory.

THURSDAY, *January 16th, A. D.* 1890.

Present and presiding: The Honorable Charles S. Zane, Ch. J.
Present also: The Honorable Thomas J. Anderson, associate justice, and the Honorable John W. Blackburn, associate justice.

ISABELLA SELEY, Administratrix of the Estate of William H. Seley, Deceased, Respondent,
vs.
THE SOUTHERN PACIFIC COMPANY, Appellant.

This cause coming on regularly to be heard was argued by Thomas Marshall, for the appellant, and by E. M. Allison, Jr., for respondent, was submitted and taken under advisement.

TUESDAY, *March 4th, A. D.* 1890.

Present and presiding: The chief justice and all the associate justices.

ISABELLA SELEY, as Administratrix of the Estate of William H. Seley, Deceased, Respondent,
vs.
THE SOUTHERN PACIFIC COMPANY, Appellant.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court be, and the same is hereby, affirmed.

Opinion of the court by Zane, Ch. J., Anderson and Blackburn concurring.

159 Thereupon and on the application therefor of counsel for appellant it is ordered that the penal sum of a supersedeas bond to be given on writ of error taking this cause to the Supreme Court of the United States be, and is hereby, fixed at $15,000 and the bond for costs at $300.

160 In the Supreme Court of the Territory of Utah.

ISABELLA SELEY, as Administratrix of the Estate of Wm. H. Seley, Deceased, Respondent,
vs.
THE SOUTHERN PACIFIC COMPANY, Appellant.

ZANE, *Ch. J.:*

This action was instituted by the administratrix of the estate of the late William H. Seley to recover damages to his widow and children in consequence of his death occasioned, as alleged, by the negligence of the appellant.

The deceased was employed by the appellant as a conductor on its freight train, and, while endeavoring to make a coupling at Wells, a station in Nevada, one of his feet became fastened in an open frog and he was run over by a car and killed.

It appears from the evidence that blocked or cast-iron frogs are used in many tracks. In these the point of the space between the rails is filled with wood or other material, so that the foot will not be held. This block is a simple device, practicable and inexpensive, and prevents the danger. It is called a safety block.

There were six or seven tracks at Wells and three frogs, and at such a place couplings are required to be made promptly at all times of the day and night, and the exclusive attention is
161 necessarily directed to the coupling. The individual at such times cannot act with deliberation, and his eye, as well as his attention, is necessarily drawn to the coupling.

Open frogs, in which the foot is liable to be caught and from which a release is difficult without more time than a man has when making a coupling, necessarily add to his hazards.

The safety block has been in use for years past. It is a simple device for the protection of employees engaged in a very hazardous employment. It is no longer an experiment. It is said that the employer is not bound to employ the latest improvements in machinery; that he is only required to see that the instrumentalities he does use are safe and suitable. An old machine or device may have been considered safe and suitable as compared with old machines or devices, but as compared with newer and more perfect ones it may not be considered safe or suitable, for the human mind is ever engaged with new inventions, and human ingenuity, with wider experience, additional skill, and with ceaseless energy, removes old impediments and dangers in perfecting the old as well as by inventing the new. While a railway company is not required to experiment with novel inventions alleged to be safer and more suitable, yet when experience has demonstrated that their use does remove hazards and preserves the lives of their employees engaged in dangerous employments, prudence as well as humanity demands that such new agencies shall be used. Such companies have no right to continue to employ such dangerous and destructive agencies as wound and kill their employees when safer and better ones are in use. We are of the opinion that the appellant was guilty
162 of negligence in using the open frog.

It is said that the defendant did not insure the deceased against injury from the dangerous agencies which it necessarily employed, and that he assumed the ordinary risks incident to his employment. While this is so, the deceased did not assume the risks from defendant's negligence. Ordinary risks are such as remain after the employer has used all reasonable means to prevent them. The ordinary risks of an employment differ from the risks from the employer's negligence.

The injuries resulting to the employee from the ordinary risks of his employment he must bear, but those that come to him alone from the employer's negligence the latter must bear. In not using the safety block the appellant neglected a reasonable means to prevent injury to its employees in making couplings, and if the deceased, without his fault, lost his life from that neglect the defendant must pay his wife and children their loss—the defendant must bear it.

It is claimed that the deceased as conductor was not authorized to couple cars, and that therefore the defendant is not liable.

It appears from the evidence that the conductor of a freight train is expected to use all reasonable diligence to get his train through on time, and that in so doing he assists in switching and making couplings if he deems it necessary; his duties are somewhat general. It appears from the evidence that Seley's train had come into the station late, and that one of the brakemen had made two attempts to couple a car on and had failed, and that the other brakeman had
163 failed once; that five or ten minutes had been lost in these attempts, and that the deceased, who had been conductor about seven years and brakeman a number of years before that, then said he believed he could make it, and then made the effort.

Under these circumstances, as a diligent and faithful freight conductor, we think he was authorized by the terms of his employment to make the effort. To have stood by under such circumstances without bringing to bear his experience and skill might have been regarded as an indication of indifference and a lack of zeal in his employer's business.

It is also said that the deceased ought to have informed his employer of the open frogs in use in its track and that they were dangerous and to have exacted a promise to repair in a reasonable time, and without such a promise or in case of a failure to comply with it, if made, he should have left the appellant's employ. No notice was necessary, because the deceased had no right to assume that his employer was ignorant of the open frogs in its track. He must have known that the company had failed to employ the safety block for fifteen or twenty years; he had been brakeman and conductor on its road for the greater part of that time. Nor do we think that the deceased assumed the risk from the open frog by entering the defendant's employ with it in use or by continuing in such employ after he knew the use of the safety block would remove its perils. Imminent danger from a defect in a machine or other instrumentalities which could be remedied or removed by reasonable and practicable means is not like those dangers that are less threatening and which a reasonable man might think he could avoid injury from by a high degree of care.

164 Ordinarily the duties of a conductor do not expose him to the perils from open frogs. In the discharge of the duties of his employment he does not usually feel called upon to assist in switching or coupling cars, and if his attention should be directed to the dangers from the open frog he might reasonably conclude that he would not very often, if ever, be exposed to its hazards in making a coupling over it. In the case of Patterson in Pittsburgh and Connellsville railroad, 76 Pa. St., 389, the court said: "If the instrumentality by which the servant is required to perform his service is so obviously and immediately dangerous that a man of common prudence would refuse to use it the master cannot be held liable for the resulting damage. * * * But where the servant, in obedience to the requirements of the master, incurs risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the result is different. In such case the master is liable for a resulting accident."

It is also claimed that the negligence of the deceased caused or contributed to his death, and that therefore the defendant is not liable.

One of the brakemen testified that they came into Wells behind time, and that he made two attempts to couple the car onto the train, and the other brakeman made one; that the deceased then said that he believed he could make it, and went in and failed; that the link was too short; that he said to the deceased that his foot was in the frog; the deceased then took it out and stepped out beside the

165 track; that witness then got a longer link and the deceased

again went in to make the coupling, and the toe of his shoe caught in a frog, and the deceased was run over and killed. Witness further said there were about five minutes between the time the deceased came out and the time he went in again and was killed. The fireman who was managing the engine at the time testified that when the train backed down to couple onto the cars one of the brakemen tried to make the coupling, but failed; then the other brakeman stepped in, and he failed, but still signaled to back up, and went in a second time, and as he came out the conductor came up, and the signal was given again to back up, and he stepped in between the cars and then stepped out and walked down in the same direction the train was moving, giving signals all the time to come back. He walked fifteen feet probably and stepped in again, and the witness saw no more of him till after he was run over. It would seem from the brakeman's testimony that the deceased made his second attempt at the same place he made the first, and that the toe of his shoe caught in the same frog that the brakeman told him to take his foot out of. He says about five minutes intervened between the two attempts, and it appears that the cars to be coupled were moved at each attempt, and the inference from the fireman's testimony is that the place of the second attempt of the deceased was about fifteen feet from the place of the first. If so, the statement of the brakeman that the deceased placed his foot in a frog when making his first attempt may not be correct.

The evidence shows but three frogs, two at one place and one at another, and their distance apart does not correspond with the distance between the places where the two attempts were made.
166 This evidence presented a conflict for the jurors to consider and reconcile if they could, and, in case they could not, to determine who they would believe. The deceased had been conductor seven years, and before that he was a brakeman. He had experience and probably possessed skill as a car-coupler, and it was his duty to get his train through, and he was behind time and was still delayed with the coupling. Under these circumstances he made his last effort. At the time his attention must have been directed to the link he was endeavoring to manipulate, and to the movement of the cars, not to where he was stepping. In moving his feet under these circumstances he did not raise one of them high enough and the toe of the shoe caught in the frog. The jury must have found that he used due care, and that his negligence did not contribute to the fatal injury. The jury were not required to test the conduct of the deceased by some imaginary standard requiring unusual care. He was only required to exercise ordinary care, such as might be reasonably *be* expected of experienced brakemen under similar circumstances. The court below overruled the defendant's motion for a new trial and entered judgment on the verdict.

It was within the province of the jury to reconcile the statements of the witnesses so far as they could on any reasonable hypothesis and to judge of their credibility, to draw all reasonable inferences from the facts in evidence, and to determine what the conduct of

the deceased was, and the circumstances surrounding him, and how his mind was occupied at the time of the fatal injury.

When there is any evidence in support of a verdict it will
167 not be set aside because it is against the weight of the evidence, unless it is so clearly wrong as to authorize the court to believe it was the result of a mistake, or that the jurors acted from passion or prejudice or some other improper motive.

Kane *vs.* Northern Central Railway, 128 U. S., 91, was an action to recover damages in consequence of an injury to a brakeman from a missing step which he knew was gone, but failed to think of at the time of the injury. The court said in the conclusion of its opinion: "We are of opinion that the court erred in not submitting to the jury to determine whether the plaintiff, in forgetting or not recalling, at the precise moment, that fact that the car from which he attempted to let himself down was the one from which a step was missing, was in the exercise of the degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling, and under circumstances in which he was placed. If he was, then he was not guilty of contributory negligence that would defeat his right of recovery."

The following cases we regard as analogous in principle to the case in hand and support this decision:

Snow *vs.* Housatonic Railroad Company, 8 Allen, 441.
Plank *vs.* New York Cen. & Hudson River R. R. Co., 60 N. Y., 607.
Devlin *vs.* The W., St. L. & P. R'y Co., 87 Mo., 545.
Chicago & N. W. R'y Co. *vs.* Bayfield, 37 Mich., 205.
Fernandes *vs.* Sac. City R'y Co., 52 Cal., 45.

168 The case of Snow *vs.* Housatonic R. R. Co., *supra*, was instituted to recover damages for an injury in consequence of stepping into a hole in a plank between the rails of the track. This language appears in the opinion: "Nor do we think it was any the less a question of fact to decide by the jury, because it appeared that the plaintiff had previous knowledge of the defect in the road which caused the accident. * * * This certainly was a circumstance to be taken into consideration, but by no means a decisive one. If the service to be performed by the plaintiff was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect or be prepared at all times to avoid it." The danger causing the injury complained of in the cases cited was the only one shown of the same character, while in this case the frogs in the defendant's track were all open and dangerous, and this is urged as a material distinction. But we incline to the opinion that a careful man informed of a number of open frogs would be as likely to overlook one happening in his way when making a coupling as he would with knowledge of but the one causing the injury. Whether the failure to recall the danger at

the time of injury in either case could be consistent with common prudence would be a question for the jury to determine.

The judgment of the district court is affirmed.

We concur.

ANDERSON, *A. J.*
BLACKBURN, *A. J.*

Endorsed: Title of cause. Opinion by Zane, C. J. Filed March 4th, 1890. Jos. P. Bache, clerk.

169 The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 13th day of October, A. D. 1890, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah Territory, wherein The Southern Pacific Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles S. Zane, chief justice of Utah Territory, this the 5th day of March, in the year of our Lord one thousand eight hundred and ninety.

[Seal Supreme Court, United States of America, Territory of Utah.]

C. S. ZANE,
Chief Justice, Utah.

To Isabella Seley, as administratrix of the estate of Wm. H. Seley (deceased).

170 TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

On this 6th day of March, in the year of our Lord one thousand eight hundred and ninety, personally appeared Oscar Vandercook, before me, the subscribed, Joseph P. Bache, clerk of the supreme court of Utah Territory, and makes oath that he delivered a true copy of the within citation to James N. Kimball, of counsel for defendant in error.

OSCAR VANDERCOOK,
Deputy U. S. Marshal.

Sworn to before me this 6th day of March, A. D. 1890.

[Seal Supreme Court, United States of America, Territory of Utah.]

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

[Endorsed:] In the supreme court of Utah. Isabella Seley, as administratrix, etc., respondent, *vs.* Southern Pac. R'y Co., appellant. Citation. Filed Mar. 6, 1890. Joseph P. Bache, clerk supreme court, Utah.

171 *Assignment of Errors & Prayer for Reversal.*

Plaintiff in error assigns the following errors occurring in the district court and perpetuated in the territorial supreme court:

First.

Insufficiency of the evidence to justify the verdict, and the same is against law, in this, to wit:

a. It fails to show any fault or negligence on the part of the defendant.

b. It shows contributory negligence on the part of plaintiff's intestate.

c. It shows that the deceased entered into the employ of defendant some thirteen years prior to the accident and continued in such employ during all said period, knowing the character of the frog used by defendant in its entire system, and thereby accepted the risk thereof with his employment.

Second.

Errors in law occurring at the trial and excepted to by the defendant as follows, to wit:

a. The court erred in overruling defendant's motion for a nonsuit.

b. The court erred in overruling defendant's objection to the question asked by plaintiff of the witness Hardy in reference to his fellow-brakeman: "Q. What experience had he had, if any, in railroading, if you know?" and in permitting said witness to answer the same.

172 *c.* The court erred in giving the instructions given on his own motion and in giving each distinct part thereof.

d. The court erred in giving the instructions asked by the plaintiff and in giving any or either of them.

e. The court erred in refusing to give the instructions numbered 1, 2, 3, 4, 5, 6, and 7, as asked by the defendant, and in refusing to give each of the same respectively and in each separate and distinct part of said instructions as requested.

Whereupon, in view of said manifest and many errors, plaintiff in error respectfully prays that the said decision of the supreme court of the Territory of Utah be reversed.

(Signed) THOS. MARSHALL,
Att'y for Plaintiff in Error.

Endorsed on back: The Southern Pacific Company, pl't'ff in error, *vs.* Isabella Seley, etc., def't in error. Assignment of errors. Filed May 24th, 1890. Jos. P. Bache, clerk. (Copy.)

173 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Isabella Seley, as administratrix of the estate of Wm. H. Seley, deceased, plaintiff and respondent, and The Southern Pacific Company, a corporation, defendant and appellant, manifest error hath happened, to the great damage to the said The Southern Pacific *Railway* Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 2nd Monday of October, 1890, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Supreme Court, United States of America, Territory of Utah.

174 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, and the seal of the supreme court of the Territory of Utah, this 5th day of March, in the year of our Lord one thousand eight hundred and ninety.

JOSEPH P. BACHE,
Clerk of the Supreme Court of Utah Territory.

[Endorsed:] Original. Southern Pacific Company, plaintiff in error, *vs.* Isabella Seley, administratrix, etc., def't in error. Writ of error. Filed March 5th, 1890. Jos. P. Bache, clerk.

175 TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

In the Supreme Court of the Territory of Utah.

ISABELLA SELEY, Administratrix of the Estate of William H. Seley, Deceased, Respondent,
vs.
THE SOUTHERN PACIFIC COMPANY, a Corporation, Appellant.

Bond on Writ of Error in Supersedeas and for Costs.

Know all men by these presents that we, The Southern Pacific Company, as principal, and John E. Dooly and Thomas Marshall, as sureties, are held and firmly bound unto Isabella Seley, administratrix of the Estate of William H. Seley, deceased, in the full and

just sum of sixteen thousand dollars, to be paid to the said Isabella Seley, as said administratrix, her certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bond ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 5th day of March, A. D. 1890.

Whereas on March 4th, A. D. 1890, the supreme court of the Territory of Utah did make and enter a judgment in the
176 above-entitled action affirming a judgment of the district court of the first judicial district of Utah Territory rendered on March 6th, 1889, in an action then pending in said district court, wherein the above-named Isabella Sepey, as administratrix of the estate of Wm. H. Seley, deceased, was plaintiff and the above-named The Southern Pacific Company was defendant; and whereas the said The Southern Pacific Company has obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court of the Territory of Utah to reverse the said judgment in the aforesaid suit and a citation, directed to the said Isabella Seley, as administratrix of the estate of William H. Seley, deceased, citing and admonishing — to be and appear at a Supreme Court of the United States to be holden at Washington the 2nd Monday of October next:

Now, the condition of the above obligation is such that if the said The Southern Pacific Company shall prosecute the said writ to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) THE SOUTHERN PACIFIC COMPANY,
By THOMAS MARSHALL, *Its Att'y.* [SEAL.]
JOHN E. DOOLY. [SEAL.]
THOMAS MARSHALL. [SEAL.]

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

John E. Dooly and Thomas Marshal, the sureties in the above bond, being duly sworn, each for himself deposes and says
177 that he is a resident and freeholder within Salt Lake county, Utah, and worth the sum specified in said bond as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

(Signed) JOHN E. DOOLY.
THOMAS MARSHALL.

Subscribed and sworn to before me this 5th day of March, A. D. 1890.

(Signed) HARRY T. DUKE,
[NOTARY PUBLIC SEAL.] *Notary Public.*

The above bond is approved by me.

(Signed) C. S. ZANE,
Chief Justice of the Supreme Court of Utah Territory.

Endorsed: Title of cause. Bond on writ of error. Filed March 5th, 1890. Jos. P. Bache, clerk.

178 UNITED STATES OF AMERICA.

TERRITORY OF UTAH,
County of Salt Lake, } ss:

I, Joseph P. Bache, clerk of the supreme court of said Territory of Utah, in pursuance of the attached writ of error, do return annexed hereto and to said writ the original citation, a transcript of the record, the proceedings, opinion, assignment of errors, supersedeas bond, all in and of said court in the cause in said writ described, to the Supreme Court of the United States; and I hereby certify that said annexed transcript of said record, proceedings, opinion, assignment of errors, and bond is a full, true, and complete copy of the several originals thereof on file or of record in my office.

Seal Supreme Court, United States of America, Territory of Utah.

In witness whereof I hereunto set my hand and the seal of said supreme court of Utah Territory this 26th day of May, A. D. 1890, at Salt Lake City, U. T.

JOSEPH P. BACHE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Case No. 14,056. Utah Territory supreme court. No. 119. The Southern Pacific Company, plaintiff in error, *vs.* Isabella Seley, as administratrix of the estate of William H. Seley, deceased. Filed June 14, 1890.

Office Supreme Court U.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

TERM No. 119.

THE SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

against

ISABELLA SELEY, as Administratrix of the Estate of William H. Seley, deceased,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

MAXWELL EVARTS,
Of Counsel.

C. G. BURGOYNE, Cor. Walker and Centre Streets, N. Y.

Supreme Court of the United States.

THE SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

AGAINST

ISABELLA SELEY, as Administratrix of the Estate of William H. Seley, deceased,
Defendant in Error.

Term No. 119.

IN ERROR TO THE SUPREME COURT OF UTAH TERRITORY.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement.

The plaintiff's intestate, William H. Seley, was for seven years, prior to his death, a conductor upon freight trains on the lines of the Southern Pacific Company and of its predecessor the Central Pacific Railroad Company, and before that time had been for many years a brakeman in the same employ (Rec., pp. 43 and 44). On the 7th day of July, 1887, the said Seley was acting as conductor of a freight train at the Town of Humboldt Wells, in the State of Nevada, and was engaged in making up his train preparatory to running out with it. He was in the depot yard at Humboldt Wells, in the course of his business, at least once a week and usually oftener (Rec., p. 21). The chief brakeman attached to the train, named Hardy, had met with some difficulty in coupling a car, and had twice failed to make the coupling. The other brakeman had also attempted to make it and had likewise been unsuccessful (Rec., pp. 11 and 12). The deceased, who had made or assisted in making one

or two couplings on that day, undertook to couple the cars which the two brakemen had failed to couple. The first time that he made the attempt, he failed for the same reason the brakemen did, *i. e.*, because the link was too short; and the chief brakeman obtained for him a longer link (Rec., p. 12). He then stepped in beside the stationary car, the longer link having been placed in the moving car, prepared to make the coupling, but the cars did not come together that time (Rec., pp. 12, 13, 19, 20, 22 and 23). Either at this time, or at the first time, when the link slipped, because it was too short (the evidence is not definite as to this), Seley had stepped into the frog, and the chief brakeman shouted to him, "*For God's sake, Seley, "get your foot out of the frog, or you'll get ketched*" (Rec., p. 20). On receiving this warning, the conductor took his foot out of the frog and stepped from between the cars. Immediately after his attention had been called to the danger to which he was exposed from this frog, he again made an attempt to couple the cars and again put his foot into the *same identical frog* (Rec., p. 24). He was unable to extricate his foot and was run over by the cars and killed. The frog into which he put his foot each time was an unblocked frog, such as was in use on the whole railroad of the defendant below. There had never been any "blocked" frogs on the defendant's road (Rec., p. 45), and no complaint appears ever to have been made to the defendant in that regard by the deceased.

An action was thereafter brought against the railroad by the widow of the said Seley in the district court of the First Judicial District of Utah in which it was charged that the accident occurred through and by reason of the negligence of the defendant in not having blocked frogs upon its railroad. Upon the trial of the case the attorneys for the defendant at the close of the plaintiff's case moved for a nonsuit, on the ground, first, that the evidence showed contributory negligence on the part of the plaintiff's

intestate; and, secondly, that the evidence failed to show any negligence on the part of the defendant (Rec., p. 45). This motion was overruled and an exception taken. At the close of the whole evidence the defendant's attorneys requested the Court to instruct the jury to find a verdict for the defendant (Rec., p. 76). The Court refused to give such instruction, and to said refusal an exception was then and there taken. The defendant's attorneys requested the Court to give to the jury certain other instructions similar to the grounds of their motion for a nonsuit, which the Court refused to give, and to which refusal an exception was duly taken. Exceptions were also taken by the defendant's attorneys to the instructions given by the Court to the jury on its own motion, and to the instructions given by the Court at the request of the attorneys for the plaintiff. The plaintiff recovered a verdict for $7,500 (Rec., p. 78). A motion was made for a new trial, which was denied. An appeal was thereafter taken to the Supreme Court of Utah Territory from the judgment entered upon the verdict and from the order denying the motion for a new trial. The judgment of the District Court was affirmed by the said Supreme Court, and the cause was thereupon brought to this Court by a writ of error.

Specification of Errors.

First. The trial Court erred in refusing to grant the motion for a nonsuit made by the defendant's attorneys at the close of the plaintiff's evidence, as follows:

"I now move a nonsuit in this case, on the ground that the evidence on the part of the plaintiff doesn't show negligence on the part of the defendant; that it does show contributory negligence on the part of the plaintiff" (Rec., p. 45).

Second. It was error on the part of the Court to refuse to give to the jury the following instruction requested by the defendant at the close of the whole evidence:

"The jury are instructed on the law of this case, to find their verdict for the defendant; 'no cause of action'" (Rec. p. 76).

THIRD. The Court erred in refusing to give to the jury the instruction requested by the defendant:

"The jury are instructed that if they find from the evidence that the railroad companies use both the blocked and unblocked frog, and that it is questionable which is the safest or the most suitable for the business of the roads, then the use of the unblocked frog is not negligence, and the jury are instructed not to impart the same as negligence to the defendant, and they should find for the defendant" (Rec., p. 77).

FOURTH. The refusal by the Court to give to the jury the following instruction requested by the defendant was error:

"The jury are instructed that railroad companies are not required to use the latest or best appliances in their business or machinery that is absolutely safe, and if the jury find from the evidence that the unblocked frog is generally used or even frequently used by railroads, then the use of such frog is not negligence of the defendant and the defendant is not liable for an accident arising therefrom" (Rec., p. 78).

FIFTH. It was error to deny the motion made by defendant for a new trial in this: that the evidence in the case is insufficient to justify the verdict, and that the same is against law in the following particulars, to wit:

"*(a)* It fails to show any fault or negligence on the part of the defendant.

"*(b)* It shows contributory negligence on the part of plaintiff's intestate.

"*(c)* It shows that the deceased entered into the employ of defendant some thirteen years prior to the accident, and continued in such employ during all said period, knowing the character of the frog used by defendant in its entire system, and thereby accepted the risk thereof with his employment" (Rec., p. 78).

POINT I.

The deceased on entering the employ of the defendant assumed, as one of the incidents of his employment, all dangers which might thereafter arise because of the use of unblocked frogs upon its railroad. In other words, the maxim, Volenti non fit injuria, is applicable to the facts in this case.

In considering this branch of the case four important facts must never be lost sight of, viz., (*a*) that the defendant used unblocked frogs at the time the plaintiff's intestate agreed to enter and entered its employment, and that it has never used anything else; (*b*) that whether a frog is blocked or unblocked is a fact apparent to any man; (*c*) that there was no defect in the frog itself; *i.e.*, it was a sound, unblocked frog; (*d*) that no complaint was made by the deceased to the defendant in regard to the use by it of unblocked frogs.

Bearing these four facts in mind, the case then resolves itself into this proposition: Can a man who has worked with an employer for thirteen years, knowing quite as well as his employer, if not better, the nature of the appliances given to him to work with, and who, because of the nature of his employment, is paid at a higher rate than is received by men in other less dangerous employments, turn around at the end of that time, when he has suffered on account of the risks involved in his employment, and claim damages from his employer for his injuries? In other words, has he not by entering his employ, with his eyes open, assumed all risks of injury which may result from the obvious dangers incident to his employment without regard to the question whether a different equipment might have

obviated some of the manifest risks which were involved in the particular service.

It would seem that the true answer to this question is given by Mr. Justice LAMAR in the case of Washington, etc., Railroad Co. vs. McDade, 135 U. S., 554, when he says at page 570:

> "If the employee knew of the defect in the
> "machinery from which the injury happened,
> "and yet remained in the service and continued
> "to use the machinery without giving any no-
> "tice thereof to the employer, he must be
> "deemed to have assumed the risk of all danger
> "reasonably to be apprehended from such use,
> "and is entitled to no recovery."

This statement of the principle is stronger than necessary to sustain the position of the plaintiff in error here, as there is no claim on the part of the plaintiff below that there was any "defect" in the frog in question, but simply that one kind of an appliance should have been used instead of another—a blocked frog in place of an unblocked one. As to this, Mr. Justice LAMAR said:

> "Neither individuals nor corporations are
> "bound, as employers, to insure the absolute
> "safety of the machinery or mechanical appli-
> "ances which they provide for the use of their
> "employes. Nor are they bound to supply the
> "best and safest or newest of those appliances
> "for the purpose of securing the safety of those
> "who are thus employed" (p. 570).

The judgment on the verdict recovered by the plaintiff in the case cited was affirmed by this court, but not upon any ground which impairs the value of the rule therein laid down. The evidence then before the court showed a defect in the machinery not acquiesced in by the plaintiff and that the plaintiff was an inexperienced man and entirely unaware of the dangers attendant upon what he undertook to do.

In the case of Tuttle vs. Milwaukee Railway, 122 U.

S. 189, the plaintiff's intestate, a brakeman in the employ of defendant, undertook to couple some cars standing upon a track known as a "boot-jack siding," which contained a very sharp curve. While endeavoring to make the coupling, the "drawheads" of the cars failed to meet, allowing the cars to come so close together that he was crushed to death. There were no bumpers on either of the cars nor other device to prevent them from going together in case the drawheads passed each other.

On the trial it appeared that the brakeman stood on the inside of the curve, where the corners of the cars came in contact when the drawheads passed each other; whereas on the outside of the curve they were widely separated and there was no danger. The trial Judge, upon the evidence adduced before him, directed the jury to find a verdict for the defendant, holding that the deceased wantonly assumed the risk of remaining upon the inside of the draw-bar when he should have gone on the other side. Upon appeal to this Court the judgment was affirmed, the Court saying, at page 195:

> "Without attempting, therefore, to give a "summary of the evidence, we have no hesita- "tion in saying that the judge was right in "holding that the deceased, by voluntarily as- "suming the risk of remaining on the inside of "the draw-bar, brought the injury upon him- "self, and the judge was right, therefore, in "directing a verdict for the defendant. We are "led to this conclusion, not only on the ground "that the deceased, by his own negligence, con- "tributed to the accident, *but on the broader* "*ground, already alluded to, that a person who* "*enters into the service of another in a particular* "*employment assumes the risks incident to such* "*employment.*"

This doctrine has been followed by this Court and the lower Federal Courts in the following cases:

Kohn vs. McNulta, 147 U. S., 238.

Bunt vs. Sierra Butte Gold Mining Co., 138. U. S., 483.
Dillon vs. Union Pac. Rd. Co.. 3 Dill., 319.
Kielley vs. Belcher S. M. Co., 3 Sawy., 500.

The question whether the plaintiff has assumed a danger as one of the incidents of his employment is entirely apart from and unaffected by the question of negligence on the part of the employer in not furnishing proper tools and appliances. If the former question is answered in the affirmative, then the plaintiff cannot recover, no matter how negligent his employer may have been.

This is clearly brought out by Mr. Justice BREWER, when Circuit Judge, in the case of O'Rorke vs. Union Pac. Ry. Co., 22 Fed. Rep., 189.

The plaintiff in that case was a car repairer who in the course of his business was under a car making some sort of repairs. While there, a car was switched on to the side track where the car he was under was standing, and struck it, moving it onto him and injuring him There was no red flag put out by plaintiff to give warning that he was there, and no red flag given to him by the defendant for that purpose. Upon the trial, a verdict was recovered by the plaintiff.

A motion was made for a new trial before Judge BREWER, which was granted. It was said at page 190:

> "The complaint is that the railroad company "was negligent in not furnishing to one engaged "in that business, and necessarily compelled to go "under cars and liable to be there injured, a red "flag which he might station out as a signal, or "furnish him an assistant to give notice of his "position; and that the railroad company was "negligent in not so doing I have no question. "Whenever they call upon an employee to go "into such a position as that, I think it is their "duty to provide him with the ordinary means "of protection, which, we are informed by the "testimony, is a red flag. It cannot be expected "that an engineer in switching cars can send a

"man forward to see whether or not some one is "under any car; and the red flag, being the "ordinary signal of danger, should have been "furnished to this man. But the troublesome "question lies back of that. This plaint- "iff was an old railroad man, fully "aware of the dangers of such work "as he was then engaged upon. He had "been employed on this road in such work for "seven or eight months, and was in the habit of "going under cars under just such circumstances. "He had no flag, and had asked for none. Now, "the railroad company insists that he waives "his right to recover for any injury received, in "consequence of that fact."

And again at pages 191 and 192:

"Of course, there can be no question where "it is expressly agreed upon. Suppose, for "instance, that I own a mill; suppose the "machinery in it is clearly defective, and I "say to an employee: 'I am running a mill in "'which there is defective machinery';—and I "point out to him the defect—'are you willing "'to work here and take the risks?' If he "says he is, he cannot afterwards recover if he "is injured. And so, in order that there should "be an implied agreement, the facts should "exist for so long a time that the employe has "opportunity to see that his employer means to "let the machine remain in that condition, and "carry on his business in that way as a general "rule; and if he then continues at work, he may "be presumed to consider the compensation "sufficient to justify him in taking the risk. In "this respect it appears that this plaintiff had "been, for seven or eight months, in the employ "of the company along this line of road; *that, "he had done this work day after day without a "flag, knowing its necessity, making no com- "plaint, asking for no change;* and it seems to "me that, after we consider this and all the "circumstances of the case, it must be said *that, "negligent although the company was, the man "assumed the risks of the danger, knowing what*

"*it was, and cannot now hold the company* "*responsible.*"

The facts and the decision of the Court in the case of The Maharajah, 49 Fed. Rep. 111, which was decided by the Circuit Court of Appeals for the Second Circuit, were stated in the opinion of the Court as follows:

> "He [libellant] imputes his injuries to the "negligence of the steamship, upon the theory "that the winch was unsafe because the handle "came dangerously near the cogs in operating "the crank-bar, *and the cogs were not covered by* "*a guard.* * * * The proofs are that the "winch was, in details of structure, substantially "like those in general use at the time it was built, "had been used on the steamship for a dozen "years or more, and was not materially out of "repair; that such winches are still in common "use upon vessels, *but an improved machine* "*has been also introduced, constructed with a* "*guard over the cogs.* * * * It also ap- "pears that the libellant was familiar with "winches, having operated them for 10 or 12 "years, and that he had been operating this "one nearly all day before the accident took "place, and had not made any complaint about "it. Manifestly the libellant undertook to use "a machine which he knew would endanger his "hand unless he exercised due care. * * * "He has no just ground of complaint against "the steamship. *One who voluntarily under-* "*takes to perform a service for another impliedly* "*consents to assume the known risks incident to* "*it, and cannot impute to the other any breach of* "*duty or negligence founded solely upon the* "*presence of such risks.*"

That the railroad was negligent in having green switch targets instead of red ones, which were more readily seen, was urged in the case of Naylor vs. N. Y. Cent. & H. R. R. Co., 33 Fed. Rep., 801, but the contention was disposed of by Judge WALLACE on the

ground that they were green when the plaintiff's intestate entered into the employ of defendant, and that, notwithstanding there might be negligence on the part of the defendant in not having red targets, yet the deceased had accepted all risks arising from the use of green targets when he entered the employ of the railroad. On this point it was said by the Court at page 802:

> "The further fact that the target at the switch "was painted green is relied upon, and the argu- "ment is advanced that if it had been painted "of a red color it would have been more readily "distinguishable at a distance, and might have "been seen by the deceased in season to enable "him to stop the engine before it left the "track. The deduction is wholly conjectural; "and the fact, standing alone, would hardly "authorize a jury to indulge such an inference. "*But when it was shown that the target was "painted the same color as that of all the "defendant's switch-targets, that all had been "green for two years previously, and that dur- "ing all that time the deceased had been en- "gaged in the same employment, the color of "the target must be treated as of no signifi- "cance.* Its color must be assumed to have "been known by the deceased. He was especially "interested in observing targets, and must have "been aware of any increased risk in conse- "quence of their color. *He was as competent "to judge of the matter as any officer of the "defendant, and is presumed to have accepted "the hazard as one of the ordinary risks inci- "dent to his employment.*

The same idea was present in the mind of Judge BROWN, of the Southern District of New York, when he said, in the case of The Luckenbach, 53 Fed. Rep., 662, 663:

> "The shutting of the door at the moment the "libellant's fingers reached the jamb, moreover, "was not a natural result of the absence of a "guard around the opening [of the hatchway].

"It had no direct connection with it; and it was "not a consequence naturally to be expected to "result, or, in fact, resulting from the absence of "a guard. * * * Even if it had been, I *should* "*have found great difficulty in allowing any* "*recovery, as the hatchway and all the arrange-* "*ments of the room were in no respect out of* "*order, but in the exact condition they were in* "*when the libellant engaged work, and were per-* "*fectly known to him.*"

Following the reasoning of the four cases last referred to we submit that the fact that there were no blocked frogs upon the defendant's road when the plaintiff entered its employ is controlling in this case. If other frogs had been blocked, and the frog in question had been an exception to the general rule, a different case would have then been presented, but there never having been any blocked frogs, and the plaintiff having known it, and yet having entered into the defendant's employ and remained with it for thirteen years without complaint, it is immaterial how negligent the railroad may have been in not having blocked frogs, and the deceased must be presumed to have assumed all risks which there might be from the use of such unblocked frogs, and he cannot recover on the ground of any negligence on the defendant's part "founded solely upon the presence of such risks" (49 Fed. Rep., 111).

Other authorities upon this point can be cited without limit from the decisions of the State courts. They would only be cumulative, and we therefore respectfully refer the Court, without citing from them at length, only to a few cases which sustain in clear and concise terms the principle which we think should govern this case:

Gibson vs. Erie Railway Co., 63 N. Y., 449.
De Forest vs. Jewett, 88 N.Y., 264.
Sweeney vs. Berlin & Jones Envelope Co., 101 N. Y., 520.
Williams vs. Del., L. & W. Rd. Co., 116 N. Y., 628.

Powers vs. N. Y., L. E. & W. R. R. Co., 98 N. Y., 274.
Anthony vs. Leeret, 105 N. Y., 591.
Shaw vs. Sheldon, 103 N. Y., 667.
Hickey vs. Taaffe, 105 N. Y., 26.
Finnell vs. Del., L. & W. Rd. Co., 129 N. Y., 669.

There is, however, a case in the Court of Appeals in the State of New York to which we desire to especially call the attention of this Court. It is entitled Appel vs. B., N. Y. & P. R. Co., 111 N. Y., 550, and cannot be distinguished in any way from the case at bar. There, the plaintiff's intestate was a brakeman employed in coupling and uncoupling cars in the yards of the defendant at Buffalo, New York, and, while so engaged, his foot was caught in an unblocked frog, and he was run over and killed. The negligence charged against the railroad was its failure to "block" the frog. The plaintiff recovered a verdict, the judgment on which was affirmed by the General Term, but on appeal was reversed by the Court of Appeals, which latter Court, as stated in the head-note of the case, "held that A, in accepting and "continuing in the employment, assumed the hazard "of all known and obvious dangers, and that he was "chargeable with notice of the difficulty in removing "the foot when caught in the frog, and of the danger "to be apprehended therefrom, and, therefore, that a "cause of action was not made out, and a refusal to "nonsuit was error."

In the decision of the case, Judge PECKHAM said:

> "The plaintiff's intestate had been a switch-
> "man for some years and had been for quite a
> "length of time in the employment of the de-
> "fendant in and about the yard where the acci-
> "dent happened, and he was, therefore, acquainted
> "with the means employed therein by the
> "defendant to accomplish its necessary work.
> "Part of the means was the 'frog' which was

" used to effect the transfer of a train from one
" track to another which crossed it. Its shape
" and purpose, and the fact that it was unblocked,
" must have been as familiar to the deceased as
" any other thing connected with the railroad."

The following are cases where an employee of a railroad corporation was either killed or injured by reason of catching his foot in an unblocked frog or guard-rail and the plaintiff was not permitted to recover on the ground that the employee had assumed the risk of working on a railroad with unblocked frogs or guard-rails.

James McNeil vs. The N. Y., L. E. & W. Rd. Co., 54 N. Y. St. Rep., 201 (July 28tth 1893).
Chicago, R. I. & P. R. R. Co. vs. Lonergan, 118 Ill., 41.
Williams vs. Cent. R. R. of Iowa, 43 Iowa, 396.
Rush vs. Mo. Pac. Ry. Co., 36 Kan., 129.
Wilson vs. Winona, etc., Rd. Co., 37 Minn., 326.
Lake Shore, etc., R. W. Co. vs. McCormick, 74 Ind., 440.
Haas vs. Buffalo, N. Y. & P. Rd. Co., 40 Hun, 145.

There may be decisions in some of the State courts, which, apparently, take a contrary view of the law to be applied in this case, but on a close examination of such authorities it will usually be found that they contain some one of the facts the absence of which in this case was particularly called to the attention of the Court in the first part of this point. The learned Justice of the Supreme Court of Utah cited in his decision the following authorities in support thereof (Rec., 85) :

Snow vs. Housatonic Railroad Co., 8 Allen 441.
Plank vs. N. Y. C. & Hud. R. Rd. Co., 60 N. Y., 607.

Devlin vs. The W., St. L. & P. Ry. Co., 87 Mo., 545.
Chicago & N. W. Ry. Co. vs. Bayfield, 37 Mich., 205.
Fernandes vs. Sac. Ry. Co., 52 Cal., 45.

The distinction between these cases cited by Chief-Justice ZANE, and the case at bar appears at once on looking carefully at the reports themselves, and it is unnecessary to point it out except in the briefest terms.

In the Massachusetts case (8 All. 441) there was a *defect* in the appliances furnished, which did not exist until *after* the entry of the plaintiff into the defendant's employ, and in regard to which the plaintiff had made a *complaint* to the defendant. The difference between the Massachusetts decision and the case at bar is pointed out by Mr. Justice HARLAN in the case of Hough vs. Railway Co., 100 U. S., 213, in which latter case the plaintiff gave notice to the railroad company, that his engine was defective in some particular, and it was upon that ground that this Court reversed the judgment for defendant and granted a new trial. It is to be inferred from the opinion of Mr. Justice HARLAN that, if the plaintiff in the case then before him had known of the defect in the engine—had not complained of it, and had remained in the employ of defendant, he could not have recovered, for the learned Judge says at page 224:

> "If the engineer, after discovering or recog-
> "nizing the defective condition of the cow-
> "catcher or pilot, had continued to use the en-
> "gine, without giving notice thereof to the
> "proper officers of the company, he would
> "undoubtedly have been guilty of such con-
> "tributory nigligence as to bar a recovery, so
> "far as such defect was found to have been
> "the efficient cause of the death. He would be
> "held, in that case, to have himself risked the
> "dangers which might result from the use of the
> "engine in such defective condition."

As to the New York case relied upon by the Supreme Court of Utah, we can only say that there was no written opinion by the Court in this case, and that it appears among the cases not reported in full, so that the facts are not as clear as they might otherwise have been, but the important distinction between that case and the case now under consideration, is that it did not in the former appear "that the deceased had actual present knowledge of the existence of the ditch" into which the plaintiff's intestate fell while trying to make a coupling. That this is so appears in the opinion of Judge TRACY in the case of DeForest vs. Jewett, 88 N. Y., 264, where he speaks of the case relied on by the Utah Supreme Court as follows:

> "The memorandum of the case of Plank vs. "N. Y. C. R. R. Co. (60 N. Y., 607), upon which "the learned judge relied at the Circuit, it is "true, states that the deceased knew of the "existence of the ditch. This was founded upon, "and perhaps justified by a statement in the "*per curiam* opinion in that case, as follows: "'He had been two months in the service of "'the defendant, and every week, probably, upon "'this turn-out on his avocations. He must have "'known of the existence of the trench,' and the "Court held that, under the peculiar circum-"stances of that case, while the fact that the "deceased knew of the existence of the ditch "'though an important fact, is not a prepon-"'derating one' on the question of contributory "negligence. The question here presented was "not under consideration. *We have examined* "*the record on which the case was heard in this* "*Court, and it does not appear, nor was it con-*"*tended by the counsel for the defense, that the* "*deceased had actual present knowledge of the* "*existence of the ditch.*"

The following is the syllabus of the case, from the opinion in which the foregoing extract was taken:

"Where, therefore, plaintiff's intestate was "employed by defendant as switchman and car- "coupler, working in a freight yard drained by "a system of small open ditches, running across "the tracks between the ties, *which were in ex- "istence when he entered the employment, and "remained without any change or alteration,* "every one of which was well-known to him, and "while engaged in coupling cars he stepped into "one of these sluices, fell under the cars and "was killed, held, that the defendant was not "liable" (De Forest vs. Jewett, *supra*).

From which it will be seen that the case of Plank vs. N. Y. C. R. R. Co. *(supra)*, if it is in conflict with De Forest vs. Jewett *(supra)*, has been overruled.

That Plank vs. N. Y. C. R. R. Co. *(supra)*, would not be considered as an authority in New York in a case similar to the one now before the Court, is shown by the opinion in the case of Finnell vs. Del., Lack. & W. Rd. Co., 129 N. Y., 669, which last case was there said to be "*unlike* that of Plank vs. N. Y. C. & H. R. R. R. Co.," and "*more like* the case of Appel vs. B., N. Y. & C. R. Co.," which latter case so singularly resembles the case at bar in every respect, that we have previously referred to it at length.

The Missouri case cited in the opinion of the Utah Court, is hardly in point here, for the reason that there was some *defect* in the track, which caused the injury to the plaintiff, and as to which he was *ignorant*, for it appears at page 548 that the plaintiff testified that "the condition of the road was good as far as he knew."

A *special order* was given to the plaintiff by his employer in the Michigan case relied on by Mr. Chief-Justice ZANE to do something for which he was not employed, and being a *weak-minded* man he was unable to understand the danger incurred in obeying it. The principles involved in this case are widely different from the ones to be applied to the facts in the present appeal, and belong, one might al-

most say, to another branch of the law of master and servant.

In the California decision, which the Utah Court has cited, the plaintiff does not seem to have been in the employ of the defendant, and the California Court does not appear to have attempted to apply any of the rules of the law of master and servant. It is simply a contribution to the vast body of law upon the general subject of contributory negligence.

There were two other cases referred to in the decision of Mr. Chief-Justice ZANE: Patterson vs. Pittsburg and Connellsville Rd. Co. 76 Pa. St., 389 (Rec. p. 83), and Kane vs. Northern Central Ry., 128 U. S., 91. The former case can be dismissed with the remark that a *defect* in the road caused the accident, and that the plaintiff had *notified* the defendant in regard to such defect, and the defendant had *agreed* to repair it. The facts in the latter case are so different from those now presented for decision that it cannot very well be considered as having any bearing on the matter at all. The plaintiff in this case (128 U. S. 91) was a brakeman, and discovered during one of his trips that the third car from the caboose had one step off at the end nearest the engine, and immediately called the attention of the conductor to the fact, who promised to drop the car at a certain junction beyond them, if he found it did not contain perishable freight. Before the train reached the junction specified, the plaintiff had occasion to cross from the car with the step off to the adjoining one, and in so doing forgot about the missing step, slipped, fell under the cars and lost both legs. As will be seen from this statement of the case, the cause of the injury was a *defect* in the appliances of the defendant, which happened *after* the plaintiff entered its employ, *had been known by him only a few hours at the most, and in regard to which he had complained to the defendant.* None of these elements are to be found in the case at bar, the plaintiff's intestate

not having been injured by any defect in the frog in question, having known of the existence of the unblocked frogs on defendant's road for thirteen years, and never having made any complaint to the defendant on that score.

We therefore submit that all of the authorities relied upon in the decision of the highest Court of Utah Territory are distinguishable from the case at bar for the reason that in not one of them was the simple case presented of a plaintiff being injured after entering the employ of a defendant with full knowledge of the character of the tools and appliances he was to work with, and remaining in such employ without complaint as to the character of such tools and appliances for thirteen years, during which time the appliances remained the same as on the day he first began to work for his employer. This is all there is in the present case, while in the cases cited by the learned Chief-Justice of the Supreme Court of Utah there are additional elements which materially alter the rules of law to be applied to them and entirely destroy the value of the cases as precedents to be used in the present discussion.

The decisions of the English Courts are all in accord with the American decisions which have been referred to, and no doubt of the correctness of the principle maintained by the defendant seems ever to have arisen in any reported case in the English Law Reports so far as we have been able to find.

The case most akin to the one at bar is Woodley vs. The Metropolitan District Railway Co. 2 Ex. Div., 384. The facts were stated by Chief-Justice Cockburn in these words at page 387: "The plaintiff was a work-
" man in the employ of a contractor engaged by the
" defendants to execute certain work on a side wall on
" their line of railway in a dark tunnel. Trains were
" passing the spot every ten minutes, and the line be-
" ing there on a curve, the workmen would not be
" aware of the approach of a train till it was within

"twenty or thirty yards of them. The space between "the rail and the wall, on which the workmen had to "stand while at work, was just sufficient to enable "them to keep clear of a train when sensible of its "approach. The place in question was wholly with- "out light. No one was stationed to give notice of "an approaching train. The speed of the trains was "not slackened when arriving near where the men were "at work, nor was any signal given by sounding the "steam whistle. It is unnecessary to say that the "service on which the plaintiff was thus employed "was one of extreme danger. While he was reaching "across the rail to find a tool he had laid down, a "train came upon him suddenly, and struck and seri- "ously injured him.

"It appeared that on a previous occasion, when "similar work was being done, a lookout man had "been stationed to give warning of approaching trains, "but this precaution had been discontinued."

The ground of the decision reversing the judgment in favor of plaintiff was that the workman had accepted the risk of being struck by trains while in the tunnel as an incident of his employment, it being said by COCKBURN, C. J., at page 388:

> "If the plaintiff, in doing the work on the "railway, is to be looked upon as the servant of "the company, the decision of the Court of "Exchequer in his favor cannot, as it seems to "me, be upheld. It could not be said that any "deception was practiced on the plaintiff as to "the degree of danger to which he would be "exposed.' He must be taken to have been "aware of the nature and character of the work "and its attendant risks when he entered into "the employ of the contractor for the job in "question, or, at all events, he must have become "fully aware of it as soon as he began to work. "If he had been misled * * * he had a right "to throw up his engagement and to decline "to go on with the work; and such would have

"been his proper course. But with a full "knowledge of the danger, he continued in the "employment, and had been working in the "tunnel for a fortnight when the accident hap- "pened. *A man who enters on a necessarily "dangerous employment with his eyes open takes "it with its accompanying risks.* * * * It is "competent to an employer, at least so far as "civil consequences are concerned, to invite per- "sons to work for him under circumstances of "danger caused or aggravated by want of due "precautions on the part of the employer. If a "man chooses to accept the employment, or to "continue in it with a knowledge of the danger, "he must abide the consequences, so far as any "claim to compensation against the employer is "concerned."

Justice MELLOR, at page 398, said:

"I think that the plaintiff, who must be pre- "sumed to know the ordinary traffic of the com- "pany, and the limited space within which he "had to work, came within the maxim, *Volenti "non fit injuria*, and has, at all events, no "remedy against the defendants."

The case of Walsh vs. Whitely, L. R., 21 Q. B. Div., 371 (1888) is very much in point. The plaintiff was employed in defendant's mill. It was his duty among other things to put a band upon a vertical wheel while in motion. The disk of the wheel was not solid throughout, but had a number of holes in it. While putting the band on the wheel his thumb slipped into one of the holes and was cut off. It appeared on the trial that these wheels were made sometimes with and sometimes without holes. The plaintiff's witnesses stated generally that the wheels with holes were dangerous, and that the holes were of no use. The plaintiff never made any complaint, because it never entered his head that it was dangerous. The plaintiff recovered a verdict which on appeal was reversed, the Court saying at page 376:

"Is there any evidence of the machine being "defective, even in the abstract? It was per- "fect in all respects. It was not impaired by "use. It had been properly kept up to the "mark. *The only suggestion is that the wheel, "which might have been solid, had holes in it, "and that, if the wheel had been solid, the plaint- "iff could not have put his thumb where he did, "and the accident would not have happened.* It "is also suggested that the wheel was too close "to the table, and that had the wheel and "table been farther apart the accident would "not have happened. There was, however, "no evidence worth mentioning of improper "construction in this respect. *But the plaintiff "had used the same kind of machine for thirteen "years and had sustained no injury. It is to our "mind clear that he would have suffered no in- "jury on the present occasion if he had used "proper care and caution.* In these circum- "stances we can see no evidence of any defect "in the condition of the machine even apart "from negligence of the employér. *It may be "that a solid wheel would have been safer, but "it would be placing an intolerable burden on "employers to hold that they are to adopt every "fresh improvement in machinery.* * * * "It seems to us that in this case there is not "a particle of evidence of any defect arising "from the negligence of the employer. *It "was a machine generally used; used by the "plaintiff for thirteen years without any com- "plaint or mischief arising; perfect and un- "impaired, and never thought by the plaintiff "to be unsafe.*"

Thomas vs. Quartermaine, L. R. 18 Q. B. Div., 685, is a leading case on this branch of the law. The plaintiff was employed in a cooling room in defendant's brewery in which was a boiling vat and a cooling vat.

The latter was not fenced in. The plaintiff went along the passage between the two vats to pull a board from under the boiling vat. He slipped, fell back into the cooling vat, and was scalded. It was held that he could not recover, BOWEN, L. J., saying, at page 699:

> "For many months the plaintiff, a man of full intelligence, had seen this vat—known all about it—appreciated its danger—elected to continue working near it. It seems to me that legal language has no meaning unless it were held that knowledge such as this amounts to a voluntary encountering of the risk. There was, therefore, in my opinion, no evidence of negligence on which the County Court Judge could act, and therefore the appeal should be dismissed with costs."

A laborer, the plaintiff's intestate, in the case of Dynen vs. Leach, 26 L. J. EX., 221, was killed through the fall of a weight which he was raising by means of an engine, to which he attached it by fastening on to it a "clip," and the "clip" had slipped off it, and it was there held that "there was no case to go to the jury in an action by his representative against the master, *although it appeared that another and safer mode of raising the weights was usual and had been discarded by the orders of the defendant*" (syllabus). Baron BRAMWELL, in his opinion, at page 223 said:

> "There is nothing legally wrongful in the use "by an employer of works or machinery more "or less dangerous to his workmen, *or less safe* "*than others that might be adopted.* It may be in- "inhuman so to carry on his works as to expose "his workmen to peril of their lives, but "it does not create a right of action for "an injury which it may occasion *when, as* "*in this case, the workman has known all the* "*facts and is as well acquainted as the master* "*with the nature of the machinery and volun-* "*tarily uses it.*"

To the same effect are the following cases:

Skipp vs. Eastern Counties Ry. Co., 9 Ex., 223.
Saxton vs. Hawksworth, 26 L. T. Rep., 851.
Griffiths vs. Gidlow, 3 H. & N., 648.
Assop vs. Yates, 2 H. & N., 768.

It would seem from the foregoing review of the cases relating to this question decided by this Court, by the lower Federal Courts, by the various State Courts, and by the Courts of England, either that the old rule that an employee accepts the risks incident to his employment must be applied here, or else that a new principle must be adopted—viz., that masters are the insurers of their servants against the apparent and ordinary risks of their employment—for, as Judge TRACY puts it in the case of De Forest vs. Jewett *(supra)*:

> "We do not see how the defendant can be "held liable in this case, without abolishing the "well-established rule that the servant, by ac- "cepting the employment, assumes the risks and "perils incident thereto, so far as they are ap- "parent and obvious."

POINT II.

The plaintiff's intestate was guilty of an affirmative act of contributory negligence, and the defendant is therefore not liable.

Aside from and independent of the contributory negligence, as it is sometimes, though hardly accurately, called by some Judges, arising from the broader doctrine of a servant assuming the risks of his employment, the deceased was guilty, at the time in question, of a direct act of contributory negligence

The testimony as to this is found at pages 19 and 20 of the record:

> "Q. Mr. Hardy, do you remember any remark that you made to Mr. Seley warning him relative to the frog, to look out for the frog?
> "A. Yes, sir.
> "Q. You remember that remark?
> "A. Yes, sir.
> "Q. Do you remember what the language was that you used to put him on his guard?
> "A. I couldn't say the words. I says: '*For God's sake, Seley, get your foot out of the frog, or you'll get ketched.*'
> "Q. What did he do when you mentioned it—did he have his foot in the frog at that time you called to him?
> "A. Yes, sir.
> "Q. He left it in?
> "A. He took it out and stepped outside of the track.
> "Q. Did he put it in again?
> "A. He did when he went in the second time.
> "Q. You had warned him once to look out for the frog?
> "A. Yes.
> "Q. Then he knew the frog was there, did he?
> "A. I suppose he did from that; yes."

It is hardly possible to conceive how a more forcible reminder of the danger he was likely to incur if he did not look out for the frogs when coupling, could have been given to the deceased. It must be remembered that the cars he was attempting to couple were not both in motion. The one by which the conductor stood was stationary (Rec., pp. 14 and 20), so that he had full opportunity to see where he was to step when the moving car came near enough to couple, or he could have taken his position by the stationary car before the moving car began to back. Furthermore, the de-

ceased was not obliged to couple cars on that exact spot of all others. He was conductor and had full control of everything in regard to his train. It is hardly more than would be expected of an ordinarily prudent man, who a moment before had caught his foot in a frog when trying to make a coupling, to refuse to run the risk of trying to couple the car in the same place. There is nothing in the law to compel him to exercise any care or caution, or to look to see if his foot is all right as regards the frog, which was nearly the cause of his death a moment before, but the law says that, if he does not do it, he must take the consequences, and not look to any one for help after he has brought misfortune upon himself. As was said by Mr. Justice MILLER in charging the jury in the case of Cunningham vs. Chicago, M. & St. P. R. Co., 17 Fed., 882, 886: "A man has no right, because a fire is built in his neighborhood, to put his finger or his clothes into it and burn them and then say, 'I may sue and recover damages.' A man has no right to thrust himself forward into a dangerous position and say, 'If I am killed somebody will get damages for it;' or, 'If I am hurt, I shall go to the hospital and be taken care of and recover damages.' He has got to take care of himself, as well as the railroad has to take care of their duties and their employes. These obligations are mutual, and it is the law, and it is your duty to require it, as the law, that if a man voluntarily puts himself into a dangerous position—does so unnecessarily, when there are other positions in connection with the discharge of his duty which are safe, which he can be placed in—he cannot recover of the railroad company for damages for that injury to which he has contributed by his own negligence. That is the law."

It is worthy of remark that, notwithstanding the strength of Mr. Justice MILLER's charge, the jury brought in a verdict for the plaintiff, which was promptly set aside by Mr. Justice MILLER, who said,

in response to a request of the plaintiff's counsel to be allowed to refer his honor to some authorities on the subject of contributory negligence: "You may read them to the next Judge who tries the case. I set this verdict aside."

The law in most States is, that a man on crossing a railroad track, must look up and down to see if trains are approaching, or otherwise he is guilty of contributory negligence and cannot recover, if he takes his chances, crosses without taking the precaution and is hurt. How much more would he be negligent if a minute before he crossed the track, a man shouted to him "Look out you don't get run over," and he yet went along without looking either to the right or left. We fail to see that there is any difference between the illustration suggested and the case at bar. Irrespective of the warning of his fellow workman, it would have been negligence upon the part of the deceased not to have looked to see where the frog was and not to have taken the precaution to keep his foot out of it, especially in view of the circumstances, *i. e.*, that he was not making a coupling between two moving cars—following along with them, intent only on joining them together, but was standing by a stationary car, waiting for another car to be backed down to him whenever he should order it backed, and with ample opportunity to see what he was doing, or was likely to do, with his feet. Would it not be much greater negligence on his part if, in addition to all these circumstances, there was added the further fact that a few minutes before he was killed the deceased had nearly lost his life, (or, at least, come so near it as to call forth from his fellow employee such an exclamation as "For God's sake, Seley, get your foot out of the frog or you'll get ketched,") by putting his foot into the same frog, which ultimately killed him, and which he couldn't help but know would hold his foot again, if he was so foolhardy as to put his foot into it. To fail to look out for the frog

the second time was clearly within the definition of negligence laid down in the case of Railroad Co. vs. Jones, 95 U. S., 439, 441, where it was said: "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done." A consideration of all the surrounding circumstances of this case and of the vital fact that a moment before the deceased nearly met his death in the same manner in which it finally came and must necessarily have been impressed with the danger to himself, even if Hardy's cry did not influence him, seems to lead to but one conclusion; no matter how hard it is to say it, and that is that "His injury was due to his own recklessness and folly. He was himself the author of his misfortune" (Railroad Co. vs. Jones, 95 U. S., 439).

There is no dispute in the evidence as to this point. It is proved conclusively by the plaintiff's own witnesses, and without a shadow of contradiction, that Seley, a few minutes before the accident, did catch his foot in the same frog, which eventually killed him, and that the brakeman Hardy called out to him "For God's sake, Seley, get your foot out of the frog or you'll get ketched."

In the case of Railroad Co. vs. Jones (*supra*), the plaintiff was a laborer in the employ of the railroad, and engaged in constructing and keeping in repair the roadbed of defendant. On returning one day from work, the plaintiff jumped onto the pilot of the engine drawing the return train, and while there the train ran into certain cars belonging to defendant standing in a tunnel and loaded with ties. The *accident was the result of negligence on the part of the defendant.* The plaintiff was injured. He subsequently brought an action against the railroad and recovered a judgment, which on appeal to this Court was reversed. Mr. Justice SWAYNE said at page 442:

"One who by his negligence has brought an in-
"jury upon himself cannot recover damages for it.
"Such is the rule of the civil and of the common
"law. A plaintiff in such cases is entitled to no
"relief. But where the defendant has been
"guilty of negligence also, in the same connec-
"tion, the result depends upon the facts. The
"question in such cases is: 1. Whether the
"damage was occasioned entirely by the negli-
"gence or improper conduct of the defendant;
"or, 2. Whether the plaintiff himself so far con-
"tributed to the misfortune by his own negli-
"gence or want of ordinary care and caution, that
"but for such negligence or want of care and
"caution on his part the misfortune would not
"have happened.

"In the former case, the plaintiff is entitled
"to recover. In the latter he is not. * * *

"The plaintiff had been warned against rid-
"ing on the pilot, and forbidden to do so. It
"was next to the cowcatcher, and obviously a
"place of peril, especially in case of collision.
"There was room for him in the box car. He
"should have taken his place there. * * *
"His injury was due to his own recklessness and
"folly. He was himself the author of his mis-
"fortune. This is shown with as near an ap-
"proach to a demonstration as anything short
"of mathematics will permit. The case is thus
"clearly brought within the second of the predi-
"cates of mutual negligence we have laid down.

"The plaintiff was not entitled to re-
"cover. It follows that the Court erred in
"refusing the instruction asked upon this sub-
"ject. *If the company had prayed the Court to*
"*direct the jury to return a verdict for the de-*
"*fendant, it would have been the duty of the*
"*Court to give such direction, and error to re-*
"*fuse.*"

The plaintiff's husband in the case of Bunt vs. Sierra Butte Gold Mining Co., 138 U. S., 483, was a miner, The roof of a tunnel in the mine where he was working had been shattered by blasting, and the superintendent gave orders to the men to prop it up with timbers.

There was a stick of timber already there and the superintendent told the men to put a post by the side of it. On one of the men suggesting that this should be taken out, the superintendent said : " If you think proper you can take out that post, but be careful of the roof; don't let it fall down on you, and be careful of the spiling." The deceased and the other men decided that it was safe to take out the post, and did so After the removal of the post, and before another had replaced it, the plaintiff's intestate sat down to rest under the roof and was killed by a piece of rock falling on him. At the time of the trial the defendant moved the Court to direct a verdict for the defendant, which motion was granted. The plaintiff thereupon appealed to this Court and the judgment was affirmed. This case, in all material points, is very similar to the case at bar. In each the plaintiff's intestate had received a warning of the danger near him and he let the warning go by unheeded and we can only say, as the Court said there, that in the present case the deceased's

> " Recklessness could hardly go farther. The " evidence would warrant no other conclusion " than that he took the risks of the work in " which he was employed, and that his negli- " gence in the course of that work was the di- " rect cause of his death. The Court therefore " rightly directed a verdict for the defendant." (p. 485).

In view of the fact that the undisputed testimony showed the negligence of the deceased, we respectfully submit that the trial Court erred in not granting the motion of the defendant's attorneys for a nonsuit, even admitting for the purpose of the argument that the defendant was negligent in not using blocked frogs on its line of road.

POINT III.

The testimony in the case fails to disclose any negligence on the part of the defendant.

The claim of the plaintiff is that an accident has happened to her husband, and that that accident would not have happened if the frog in question had been blocked, and that therefore the defendant must have been negligent in not blocking the frog. This is hardly the true rule by which to measure an employer's liability. As was said in the late case of Augerstein vs. Jones, 139 Pa. St., 183, 187, "The substantial meaning of this is, that, if the accident could have been prevented by screwing down the plate, the defendants were negligent in not doing so, and the plaintiff could recover. *This method of treatment makes the fact of the accident and its possible prevention the test of the negligence of the defendant which produces legal liability. It has been so many times decided, and by so many courts of last resort, that this is not the legal test of liability for negligence*, especially where the plaintiff is an employee, and the action is against his employer, that it seems a work of supererogation to cite the authorities."

Before the plaintiff can establish the least foundation for her contention that the defendant has been negligent in not providing blocked frogs upon its roads, she must at any rate prove that such frogs are in ordinary and general use upon other lines of railway. This she not only has not done, but she has not even established that they are used upon any railroad in the country. To be sure, she has undertaken to show that blocked frogs were used at the time of the accident on the Union Pacific system, but it appears from the testimony that they were unsuitable and their use abandoned, at least as to that part of the Union Pacific system on which it

was testified they were used. On page 55 of the Record one of the witnesses testifies:

> "Q. Well, have you ever seen the block frog "used? The frog with blocks. I don't mean "the cast-iron blocks.
> "A. I have seen it used.
> "Q. Whereabouts?
> "A. On the U. P. Railway.
> "*Q. Are they now used at this end of the line?*
> "*A. No, sir.*
> "*Q. What became of them: have they aban-"doned them?*
> "*A. The train cut them up so that they ain't "no use.*"

The plaintiff's witness Samuel Yomans, an employee of the U. P. Road, testifies on cross-examination, at page 30 of the Record, as follows:

> "Q. Mr. Yomans, are there blocked frogs in "the Ogden yard of the Union Pacific?
> "A. The frog blocked, yes.
> "Q. I'll ask you if whether that is used on the "Union Pacific at Ogden. There are some blocks "in, but the majority of the frogs are not "blocked. That is the case, isn't it?
> "A. Yes, sir. *There are some blocks in in Og-"den, but the majority are not blocked.*"

That the use of the blocked frog was not common is shown by the plaintiff's own witness, at page 32 of the Record:

> "Q. You may state whether or not there is "any difference between a blocked and an un-"blocked switch frog, and, if so, what the dif-"ference is?
> "A. I never worked where there was a "blocked frog."

Supposing however, that the plaintiff had shown the use of blocked frogs on the Union Pacific Road (which it is only fair to say she has not), isn't the burden upon her to show that at least some others of the countless lines

of railway in this country have adopted this device, but her own witnesses show the contrary, any way as to the majority of roads, as at page 31 of the record.

"Q. You don't know anything about any "other road than the Union Pacific?

"A. I never worked on any other road than "the Union Pacific. I've been over them a "good deal but never worked on any of them.

"*Q. Have you noticed whether roads in this "Western country use the blocked frog or the frog "blocked?*

"*A. I think there are more unblocked than "there are blocked.*

"*Q. It is more usually unblocked than it is "blocked?*

"*A. I think so.*"

Now, as against this attempt of the plaintiff to show that the Union Pacific Road used a blocked frog, the defendant, in addition to showing that nowhere on its immense system was a blocked frog used (Rec. p. 45), established that one of the best equipped railroads in this country never used one, by the following testimony at page 60:

"Q. Mr. Hart, on what other roads have you "worked?

"A. New York Central and Hudson River Railway.

* * * * * *

"Q. What was the character of the frogs there, "blocked or unblocked?

"A. Unblocked.

* * * * * *

"MR. MARSHALL: Now, you may state as far "as you know in your experience in railroading "what has been the custom—as far as your "knowledge leads you what has been the cus- "tom on long tracks and numbers of tracks as "to the use of the blocked or unblocked frog?

"A. The custom as far as I know it has not "been used.

"Q. As far as you know the unblocked frog is "used?

"A. Yes, sir."

There is also evidence to show that unblocked frogs were used on the Hannibal and St Joe road (Rec., 56).

This examination of the record shows conclusively that the plaintiff has not proved it to be usual for railroads to use blocked frogs; but, on the contrary, that it was so unusual that she was unable to establish that even one road had adopted this device. She did, no doubt, attempt to show that the Union Pacific had used them, but it was very apparent that any general use of them was abandoned, as most of the frogs in the yard at Ogden, on the Union Pacific road, were unblocked, and yet there were a pile of blocks there for use at any time (Rec., pp. 31 and 32).

Taking, then, the most favorable view for the plaintiff of the testimony contained in the record, all the inference that can possibly be drawn from it is that the question of unblocked frogs was still in an experimental stage and that the railroads had not determined for themselves that the device was a success. The Union Pacific system had practically given it up, but not formally so, as their instructions (though not enforced) were to use blocked frogs (Rec., p. 31). A railroad, of course, acting, if you please, entirely in its own interest, naturally employs all the appliances which will conduce to the carrying on of its business in safety. Blocked frogs seem generally to have been considered more unsafe than safe, for reasons very apparent. The first duty of a carrier is obviously to its passengers, and not to its employees. As was said by Mr. Justice BREWER in Aerkfetz vs. Humphreys, 145 U. S., 418, 419: "The plaintiff was an employee, and, therefore, the measure of duty to him was not such as to a passengeer or stranger." Those appliances must be used which will tend to eliminate as far as possible the dangers attendant upon its general business. The dangers arising from the use of a blocked frog are clear to any one on a moment's consideration. In the first place they are liable to be broken and get out of place. The flange of the car wheel passes over them,

and if they become misplaced it is very obvious that such misplacement might easily throw the train from the track. In addition to this difficulty, bolts, stones, gravel or any such article might accidently lodge upon these blocks and so be the cause of a railroad wreck. Besides this, the wooden blocks are apt to be green when bolted in place. The wood afterwards becomes well seasoned, the bolts become loose and the rails spread. All these questions the railroads have undoubtedly carefully considered, and, whether from selfish motives or otherwise, have determined that a railroad is safer for its passengers without a blocked frog, whatever it may be as to its employees. As to this latter proposition, whether a blocked frog or an unblocked frog is safer for a railroad employee, we think that an examination of the record will certainly leave it an open question. For many reasons the unblocked frog is safer; for some reasons, more apparent perhaps than important, a blocked frog is safer. The quickness, however, with which the blocks are destroyed and fall out of repair, would always be a source of immense danger to employees on a road using blocked frogs, because of the sense of fancied security which they would naturally have, and their consequent failure to be looking out for the frogs; whereas, if the frogs were all unblocked, the employee would be on his guard, and it would become a second nature and matter of habit with him to be on the lookout while he was engaged in work about the tracks of the road. The following extracts from the testimony point out the dangers to employees to be apprehended from the use of blocked frogs:

> "Q. How is it then as regards protecting "railroad men, does the danger increase or "diminish by the use of the safety block's lia- "bility to get out of repair?
>
> "A. I should suppose that where switchmen "or trainmen once get used to a block they "would use less care in switching around the

"frog in the future and that if such blocking "should get out of order he would be more "liable to get caught.

"Q. I'll ask you if it is liable to frequently "get out of repair?

"A. Yes, sir. I see a case right over here "this morning where there is a blocked frog "and still you could get your foot in under the "block and get caught.

"Q. The block frog becomes shattered?

"A. The block itself becomes shattered and "worn along the side of the rail.

"Q. Is it then worse than no block at all?

"A. Yes, sir; I should consider it so."

(Rec. p. 48.)

"Q. Mr. Yomans, I would ask you this, "whether it isn't ordinary or frequently the "case that in a very short time after these "blocks are put in that they become shattered "and unsafe, and becomes even more dangerous "than it would be if not blocked at all?

"A. Well, I don't know that it becomes "more dangerous—think not.

"Q. It lasts but a very short time—very "soon becomes shattered?

"A. Yes, sir."

(Plaintiff's Witness, Rec., p. 31.)

We therefore submit that the record shows an entire failure on the part of the plaintiff to establish that the blocked frog is in general and ordinary use by the railroad lines in this country, and that the general use of blocked frogs is safer than the employment of unblocked frogs, either as regards the safety of the employees of a railroad alone, or in respect to the whole business of a carrier, *i. e.*, the carrying of its passengers and its duty to its employees.

Admitting, for the sake of the argument, that there was evidence in this case to show that by the general consent of railroads a blocked frog was safer than an unblocked frog, and that the former had been generally adopted by railway companies in this country, we maintain that legally, however much, on such an assump-

tion of facts, it might be to blame morally, the appellant was in no way called upon to put into use upon its line unblocked frogs, and could not be held responsible to the plaintiff in this case for not so doing. The principle, as we understand it, is that an employer is not obliged to change his plant when a new invention is discovered, nor to replace his machinery and appliances because they have become out of date. If he still prefers to do business with the same tools he has always used, there is nothing in the law which subjects him to civil liability for so doing, and if workmen care to work for him, when they know he uses such tools and appliances, they must take the consequences. There is simply a contractual relation between them, and if the workman cares to assume it and make such a contract, he alone is to blame. In other words, the master owes no duty to his servant to furnish only the best, safest and latest appliances, and a failure to provide them is not evidence *per se* of negligence. This is the rule recognized and approved of by this Court in the case of Washington, etc. Railroad Co. vs. McDade, 135 U. S., 554, 570, where it was said:

> "Neither individuals nor corporations are "bound, as employers, to insure the absolute "safety of the machinery or mechanical appli- "ances which they provide for the use of their "employes. *Nor are they bound to supply the "best and safest or newest of those appliances for "the purpose of securing the safety of those who "are thus employed.*"

In the case of Randall vs. Baltimore & Ohio R. R. Co., 109 U. S., 478, the plaintiff was injured in the course of his employment by the defendant as a brakeman. It appeared on the trial that he was hurt, while unlocking a ground switch, by a train other than his own. One of the grounds of negligence charged against the defendant was that it did not have an upright switch instead of a ground switch, as the former was

safer. At the close of the whole evidence the Court directed the jury to return a verdict for the defendant, which the jury did, and the plaintiff sued out a writ of error. The judgment of the lower Court was affirmed, by this Court, which said at page 482:

> "there was no sufficient evidence of any negli-
> "gence on the part of the railroad company in
> "the construction and arrangement of the
> "switch, to warrant a verdict for the plaintiff on
> "that ground. The testimony of the plaintiff
> "and his witness was too slight. A railroad
> "yard, where trains are made up, necessarily
> "has a great number of tracks and switches
> "close to one another, and anyone who enters
> "the service of a railroad corporation, in any
> "work connected with the making up or moving
> "of trains, assumes the risks of that condition of
> "things. * * * The switch was of a form
> "in common use, and was, to say the least,
> "quite as fit for its place and purpose as an up-
> "right switch would have been."

The facts in the case of The Serapis, 51 Fed. Rep., 91 make it very much in point, and are as follows: The libellant was a stevedore employed upon a ship to manage a winch while the cargo was taken out of a forward hatch. The winch had been in use for six years, was in good order, and the libellant was familiar with it, having worked with it the night and morning before he was hurt. *There was, however, "no covering or guard over the the cogs to protect the hands of the operative, as is usual in machines of this character."* While turning about to see what was going on behind him his fingers became caught in the cogs, and crushed. It was held that the owners of the vessel were not called upon to furnish a winch with a guard over the cogs, Judge BOND, who delivered the opinion of the Circuit Court of Appeals for the Fourth Circuit, saying, at page 93:

> "Now, the question is whether the owners of
> "the steamship Serapis can be called negli-
> "gent because they had on board the steamer
> "a winch which had been there for six years, in

> " continual use, was in perfect order, but re-
> " quired more care on the part of the person who
> " worked it than some more modern machines of
> " the kind. And this, too, when the machine
> " was well known to the employe, and that it
> " required somewhat more attention on his part
> " than other machines fitted for similar use.
> " We are of opinion that, where a workman is
> " employed to do certain work with a machine
> " which he fully understands, though it may not
> " be of the newest pattern, but nevertheless is
> " in perfect order of its kind, and may require
> " more care than newer patterns, he takes the
> " risk of all accidents which may befall him in
> " its use. And if, as is the fact in this case, he
> " did not exercise the care required, he must
> " suffer the consequence of his negligence."

The case of Townsend vs. Langles, 41 Fed. Rep., 919, is very similar to the one last cited. It appeared that the cog-wheels and similar machinery in other parts of the same factory were covered, but the Court said :

> "The question presented by the demurrer,
> " and at the argument upon it, is this: Did
> " not the plaintiff, when he agreed to work at
> " the dough-mixer, assume a risk, to be borne
> " by himself, of all the circumstances out of
> " which he says his injury arose? *So far as*
> " *relates to the absence of the covering upon and*
> " *around the cog-wheels, this fact has been held by*
> " *very highly esteemed authorities not to be per se*
> " *negligence on the part of the employer.*"

The case of Schroeder vs. Michigan Car Co., 56 Mich., 132, is considered a leading authority on this question, deriving increased value from the fact that it was decided by Judge COOLEY. It resembles in its main facts the two cases last referred to. The judgment holding the plaintiff not entitled to recover was affirmed, and the following is from the opinion at page 133 :

> " From this statement of facts it will appear

"that if the defendant has been guilty of any "negligence contributing to the injury, it is to be "found in the fact that a machine is made use "of which is not so constructed as to guard as "well as it might against similar accidents. "Had the machine been constructed with a "shield over the cog-wheels, this particular ac- "dent would probably not have occurred; and "any ony whose attention was drawn to the "danger of such accidents would probably have "perceived the desirability of such a shield.

"But the machine is shown by the evidence "to be manufactured and sold by a prominent and "reputable house and much used throughout the "country, and the defendant cannot therefore "be said to be exceptionally wanting in prudence "in purchasing and making use of it. Such "danger as would result from making use of it "was perfectly apparent, and would seem to be "easily avoided." * * *

To the same effect see

The Maharajah, 40 Fed. Rep., 784 (affirmed in Circuit Court of Appeals, 49 Fed. Rep., 111).

It would seem that this is the acknowledged doctrine in the courts of this country, and it is especially well put in the decisions of the Court of Appeals in the State of New York.

The plaintiff, in the case of Sweeney vs. Berlin & Jones Envelope Co., 101 N. Y., 520, was injured by some sort of a press worked by steam. It was old fashioned, and with no modern improvements. The Court said (p. 524):

"He knew as much about it, and the risk "attending its use as the master. The defend- "ant could not be required to provide himself "with other machinery or with new appliances, "nor to elect between the expense of so doing, "and the imposition of damages for injuries "resulting to servants from the mere use of an "older or different pattern. In the absence of "defective construction, or of negligence or

" want of care in the reparation of machinery
" furnished by him, the master incurs no lia-
" bility for injuries arising from its use. The
" general rule is that the servant accepts the
" service, subject to the risks incidental to it,
" *and, where the machinery and implements of*
" *the employer's business are at that time of a*
" *certain kind or condition, and the servant knows*
" *it, he can make no claim upon the master to*
" *furnish other or different safeguards.*"

The following State decisions are in accord with the foregoing:

Burke vs. Witherbee *et al.*, 98 N. Y., 562.
Bajus vs. S. B. & N. Y. Rd. Co., 103 N. Y., 312.
Kern vs. De C. & D. S. R. Co., 125 N. Y., 50.
C. R. I. & P. R. R. Co. vs. Lonergan, 118 Ill., 41.
Augerstein vs. Jones, 139 Pa. St., 183.

In England the same rule has always been applied and the Judges there have invariably held that no negligence could be imputed to a master because his tools and appliances were not so good as those used by some other man. As Baron Bramwell said in the case previously quoted of Dynen vs. Leach (26 L. J. Ex., 221), "There is nothing legally wrongful in the use by an employer of works or machinery, more or less dangerous to his workmen, or less safe than others that might be adopted."

The English judges have always laid great stress upon the fact that the servant simply made a contract with his master when he entered his employ, and, if he knew what that contract was when he made it, there was no reason why he should not be bound by it the same as by any other agreement. As Justice WILLES says:

" He was aware of it and took his wages on
" that footing, and it has been held that he has,
" under those circumstances, no more claim than

> " the soldier, who takes the Queen's shilling, for " danger in the service " (Saxton vs. Hawksworth, 26 L. T. Rep., 851).

This examination of authorities would seem unnecessary for the reason stated in the first part of this point, namely, that the plaintiff has utterly failed to establish that there was any better appliance than an unblocked frog, or, if there was, that it was in general use ; but conceding that she has, we respectfully submit that, under the law as we understand it, that fact alone would give her no claim against the appellant, and would not make the railroad company guilty of any negligence for which it could legally be held liable.

POINT IV.

If the testimony in this case shows either that there was no negligence on the defendant's part, or that there was contributory negligence on the part of the plaintiff's intestate, or that the deceased assumed the risk of being injured by the unblocked frogs on the railroad of the defendant, when he entered its employ, then the trial Court erred in not granting the motion for a nonsuit made by the attorneys for the defendant at the end of the plaintiff's case and in not directing the jury to find a verdict for the defendant at the close of the whole evidence.

Under the decisions of this Court there was nothing to go to the jury in this case. There was a total failure

of the testimony to show any facts from which negligence on the part of the defendant could properly or reasonably be inferred. There was clear and undisputed evidence of an act of contributory negligence on the part of the deceased, and there was abundant testimony, the only just inference from which was that the deceased had voluntarily assumed all dangers which might happen to him from working on a railroad which did not use blocked frogs. As we understand the law it is for the trial Judge to determine whether any facts have been established from which negligence can justly be inferred. It is for the Judge to say whether from the facts proved no other inference but that of contributory negligence can properly be drawn, and it is also his duty to decide whether the testimony establishes as a matter of law that the employee assumed the risk of being killed in the way he was when he entered the employ of his master. Having determined all or any one of these questions in favor of the defendant, the proper practice for the Judge to pursue is to withdraw the case from the jury and either to order the plaintiff to be nonsuited at the end of his case or at the close of the whole evidence, to direct the jury to find a verdict for the defendant.

This was the practice followed in most of the cases heretofore referred to, and was recognized as the proper one in the case of Randall vs. Baltimore & Ohio R. R. Co., 109 U. S., 478, where Mr. Justice GRAY said at page 482.

> " It is the settled law of this Court, that when
> " the evidence given at the trial, with all infer-
> " ences that the jury could justifiably draw from
> " it, is insufficient to support a verdict for the
> " plaintiff, so that such a verdict, if returned, must
> " be set aside, the Court is not bound to submit
> " the case to the jury, but may direct a verdict for
> " the defendant. * * * And it has recently
> " been decided by the House of Lords, upon

> " careful consideration of the previous cases in
> " England, that it is for the Judge to say whether
> " any facts have been established by sufficient
> " evidence, from which negligence can be reason-
> " ably and legitimately inferred; and it is for
> " the jury to say whether from those facts when
> " submitted to them, negligence ought to be
> " inferred. Metropolitan Railway Co. vs. Jack-
> " son, 3 App. Cas., 193."

And, again, in the case of Gunther vs. Liverpool Ins. Co., 134 U. S., 110, it was said at page 116:

> " If the case had been submitted to the jury
> " upon the testimony introduced, and a verdict
> " had been returned for the plaintiff, it would
> " have been the duty of the Court to set it aside
> " for want of any evidence to warrant it. Under
> " such circumstances, it is well settled that the
> " Court was not bound to go through the idle
> " form of submitting the case to the jury, but
> " rightly directed a verdict for the defendant."

As was said by this Court in North Penn. Railroad vs. Commercial Bank, 123 U. S., 727–733: " It would be an idle proceeding to submit the evidence to the jury, when they could justly find only in one way."

In Schofield vs. Chicago & St. Paul Railway Co., 114 U. S., 615, it was held that the proper practice in cases where contributory negligence on the plaintiff's part was clear was for the trial Judge to direct a verdict for the defendant, Mr. Justice BLATCHFORD saying, at page 617:

> " The ground upon which the Circuit Court
> " directed a verdict for the defendant (2 Mc-
> " Crary, 268) was, that the plaintiff, by his own
> " showing, was guilty of contributory negligence,
> " whatever negligence there may have been on
> " the part of the defendant. Applying the test,
> " that, if it would be the duty of the Court, on
> " the plaintiff's evidence, to set aside, as con-
> " trary to the evidence, a verdict for the defend-
> " ant, if given, the Court had authority to

"direct a verdict for the defendant, it "considered the case under the rules laid down "in Continental Improvement Co. vs. Stead, 95 "U. S., 160, and especially in Railroad Co. vs. "Houston, *Id.*, 697, and arrived at the conclu- "sions of law, that neither the fact that the "train was not a regular one, nor the fact of its "high rate of speed, excused the plaintiff from "the duty of looking out for a train. * * *

"These conclusions of law approve themselves "to our judgment, and are in accordance with "the rules laid down in the cases referred to."

Mr. Justice HARLAN, in Goodlett vs. Louisville Railroad, 122 U. S., 391, held that the case was properly withdrawn from the jury. The facts appear at page 411 of the opinion to have been as follows:

"The question arises whether the Court erred "in withdrawing the case from the jury and di- "recting a verdict for the company. * * * "The evidence makes a case of utter reckless- "ness upon the part of the deceased, who was "a section boss of the defendant, charged with "the duty of keeping its road in repair between "certain points, so that trains could pass over "it in safety. He was guilty of the grossest "negligence in running his hand-car into the "deep cut where he was injured without having "sent any one ahead to watch for and warn the "passenger train which he knew was approach- "ing or would soon reach that point on the "road. But for his negligence in that respect "he would not have been injured.

"It is said, however, that, despite any negli- "gence to be fairly imputed to the deceased, the "agents of the company who were in charge of "the passenger train might have avoided in- "juring him had they exercised reasonable dili- "gence to that end. * * *

"The jury having been properly directed, in "view of all the evidence, to find a verdict for "the company, it is unnecessary to consider the "exceptions taken to its refusal to grant certain "instructions asked in behalf of the plaintiff."

In Pleasant vs. Fant, 22 Wall., 116, it was said by Mr. Justice MILLER, at page 122:

> "We hold the true principle to be that, if the "Court is satisfied that, conceding all the "inferences which the jury could justifiably "draw from the testimony, the evidence is in- "sufficient to warrant a verdict for the plaintiff, "the Court should say so to the jury."

The views of Mr. Justice CLIFFORD upon this point were expressed as follows in the case of Weightman vs. The Corporation of Washington, 1 Black's Rep., 39, 49, "Where there is no evidence to sustain the action, or one of its essential elements, *the Court is bound so to instruct the jury.*"

It may be said that the foregoing cases cited from the decisions of this Court are not cases that have been submitted to the jury, but are merely declaratory of the proper practice in instances where the case has been withdrawn by the Judge from the jury, and that when the questions involved in a case have once been passed upon by a jury this Court will not disturb the verdict. There would seem to be little force in this distinction. If a case ought, in the first instance, to have been withdrawn from a jury, and if it was error not so to withdraw it, that error cannot be corrected by the fact that the jury have made a further error in the case. If the defendant was entitled to have the case taken from the jury and a verdict directed in its favor, it cannot have lost that right because the Judge refused so to do and the jury brought in a verdict for the plaintiff.

It is, however, unnecessary to discuss this question, as in the case of Railroad Co. vs. Jones, 95 U. S., 439 (cited at length on p. 28 of this brief), a judgment recovered by the plaintiff was reversed by this Court on the ground that there was clear and undisputed evidence of contributory negligence on the part of the plaintiff. To be sure there was no request on the part

of the defendant to direct a verdict in its favor, but it is to be inferred from the opinion that if there had been, and it had been refused, the judgment would have been reversed, for the Court says at page 443: "If the company had prayed the Court to direct the jury to return a verdict for the defendant, it would have been the duty of the Court to give such direction, and error to refuse."

See also the case of District of Columbia vs. McElligott, 117 U. S., 621.

In speaking of the submission of the question of negligence to a jury, WILLES, J., in the case of Ryder vs. Wombwell, Law Rep., 4 Ex., 38, *reversing the judgment for the plaintiff in the Court below*, said:

> "Such a question is one of mixed law and "fact; in so far as it is a question of fact, it "must be determined by a jury, subject no "doubt, to the control of the Court, who may "set aside the verdict, and submit the question "to the decision of another jury; but there is "in every case a preliminary question, which is "one of law, viz., whether there is any evidence "on which the jury could properly find the ver-"dict for the party on whom the onus of proof "lies. If there is not, the Judge ought to with-"draw the question from the jury, and direct a "nonsuit if the onus is on the plaintiff, or direct "a verdict for the plaintiff if the onus is on the "defendant. It was formerly considered neces-"sary in all cases to leave the question to the "jury, if there was any evidence, even a scin-"tilla, in support of the case; but it is now set-"tled that the question for the Judge (subject, "of course, to review) is, as is stated by MAULE, "J., in Jewell vs. Parr, 13 C. B., 916, 'not "whether there is literally no evidence, but "whether there is none that ought reasonably "to satisfy the jury that the fact sought to be "proved is established.'"

Again it was said by Baron Bramwell, in the case of Cornman vs. Eastern Counties Railway Co., 4 H. & N.,

781, 786, when he *reversed the judgment on the verdict in favor of the plaintiff in the lower Court:*

> "I adopt the rule stated by WILLIAMS, J., in Toomey vs. The Brighton Railway Co., 3 C. B. N. S., 146.—'It is not enough to say that there was some evidence; a scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the Judge in leaving the case to the jury; there must be evidence on which they might reasonably and properly conclude that there was negligence.'"

In Woodley vs. Metropolitan District Railway Co., 2 Ex. Div., 384 (cited at p. 19 of Brief), the plaintiff recovered a verdict. Motion was made by the railway company to enter a verdict for defendant, which was granted upon the ground that the plaintiff assumed the risk of the injury he had received when he entered the defendant's employ.

In the two following cases the plaintiff obtained a judgment, which was reversed upon appeal upon grounds similar to the ones on which a reversal of the judgment below is asked in this case.

Thomas vs. Quartermaine, L. R., 18 Q. B. Div., 685.

Walsh vs. Whitely, L. R., 21 Q. B. Div., 371.

The plaintiff in the case of Appel vs. B., N. Y. & P. R. Co., 111 N. Y., 550, which is on all fours with the case now under discussson, recovered a judgment, which was reversed on appeal.

We therefore respectfully submit that upon the evidence in the case at bar the Judge erred in refusing to direct a verdict for defendant, that that error was not cured by the subsequent verdict for the plaintiff, and that for that error the judgment below should be reversed.

POINT V.

The judgment of the Supreme Court of Utah Territory, affirming the judgment of the Court below in favor of the plaintiff, and the order denying the motion for a new trial, should be reversed and a new trial ordered.

MAXWELL EVARTS,
Of Counsel for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

October Term, 1893.—No. 119.

THE SOUTHERN PACIFIC COMPANY, Plaintiff in Error,

vs.

ISABELLA SELEY, Administrix of the Estate of William H. Seley, Deceased, Defendant in Error.

In Error to the Supreme Court of the Territory of Utah.

Brief on Behalf of Defendant in Error.

S. SHELLABARGER, and
J. M. WILSON,
Of Counsel for Defendant in Error.

Press of McGILL & WALLACE, 1107 F Street N. W.

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Brief on Behalf of Defendant in Error.

THE FACTS.

The action below was one brought by Isabella Seley, as administratrix of the estate of William H. Seley, deceased, in the District Court for the First Judicial District of the Territory of Utah, against the Southern Pacific Company, a corporation, for damages for the killing of plaintiff's intestate, as shown by the Record herein, as follows:

The deceased, at the time of his death, was forty-one

years of age, and was then, and for about seven years prior thereto had been, in the employ of the Southern Pacific Company as a conductor of freight lines, and, before that time, had been a brakeman (R., 43–4). On the 7th day of July, 1887, the said Seley was acting as conductor of a freight train at the town of Wells, in the State of Nevada. The train was behind time (R., 23); some freight was unloaded, and cars switched from one track to the main line and cars put on another track. (R., 10.)

The main track of the line on which said train was runs east and west through said town of Wells, and at said station there is what is known as a "three throw switch," with a frog about thirty feet from said three throw switch, and two other frogs about fifteen or twenty feet from the said first frog, making the location of the last-named frogs about fifty feet from the said switch (R., 11, and Diagram, R., p. 24). Seley, as such freight conductor, had the general charge and control of said train, including the men thereon, the make-up of the train, the loading and unloading of freight, the switching and coupling of cars, &c., and the conducting of the train (R., 38).

On the day above named, there were two brakemen on said train under the said conductor, Seley. One of the brakemen endeavored to make a coupling of said train with a car, but failed; he again made an attempt to effect said coupling, and again failed—this, as shown by the Record, was because of the smallness of the link used by him, which slipped back into the draw-head (R., 11). The other brakeman then attempted to make the coupling, and, also, failed for like reason (R., 12, 19). Seley, who was standing by supervising said work, then attempted to make the said coupling himself. He made one attempt, but did not succeed, because the link used was too short and slipped back as before. The link was

then changed, another link being handed to him by the brakeman, Hardy (R., 12); Seley stepped in to make the coupling, and, while so engaged, the toe of his foot was caught in a frog, and, being unable to withdraw it, he was struck on the calf of the leg by the break beam, thrown down, run over and killed (R., 13, 14).

In attempting to make the coupling the first time, it seems that Seley placed his foot in a frog—that he was then warned by the brakeman to take his foot out of the frog, and that he did so, and stepped outside of the track (R., 20). There is seemingly a conflict—or, more properly speaking, a want of definiteness,—in the Record in regard to the exact spot where Seley attempted to make the coupling the second time, whether at the frog where he first made the attempt to couple, or whether at the second set of frogs, about fifteen or twenty feet from the first frog.

Plaintiff in error, in its statement, makes the assertion that deceased caught his foot the second time, when he was killed, in the same identical frog where he first made the attempt to couple (Brief, p. 2), basing that upon the testimony of the brakeman, Hardy, (R., 24). The same witness, however, states that about five minutes intervened between the two attempts of Seley to make the coupling. It appears that the cars to be coupled were moved at each attempt, and the inference from the testimony of the fireman, Compte, is, that the place of the second attempt to make the coupling was about fifteen feet from the place of the first (R., 39, fol. 114). As this is about the location of the second set of frogs, it seems probable that the location of the second attempt of Seley to make the coupling was at the second set of frogs, and at a point about fifteen feet distant from the place where he first attempted to make the coupling, and was warned to take his foot out of the frog. The frogs of the said

company at said point were what are known as "unblocked" frogs (R., 16).

The verdict of the jury, upon trial had in said case was in favor of plaintiff, for $7,500 (R., 78). Motion was made for a new trial, and denied (R., 79). An appeal was thereupon taken to the Supreme Court of the Territory of Utah, from the judgment entered upon the verdict, and from the order denying motion for a new trial (R., 80); which resulted in the affirming of the judgment of said District Court by the said Supreme Court (R., 81), and the case was, thereupon, brought to this court by writ of error (R., 88); the opinion of the said Supreme Court is in the Record (pp. 81–86).

Plaintiff in Error's Assignment of Error.

The specification of errors, on behalf of the plaintiff in error, is set forth in its printed brief (at pages 3 and 4), and asigns error as follows:

1. Because the evidence does not show negligence on the part of defendant, and does show contributory negligence on the part of the plaintiff.

2. The court erred in refusing to instruct the jury at the close of the whole evidence: "The jury are instructed, on the law of this case, to find their verdict "for the defendant; no cause of action."

3. The court erred in refusing to instruct the jury, as requested by the defendant, "that, if they find from the "evidence that the railroad companies used both the "blocked and unblocked frog, and that it is questionable "which is the safest and most suitable in the business of "the roads, then the use of the unblocked frog is not "negligence, and the jury are instructed not to impute "the same as negligence to the defendant, and they "should find for the defendant."

4. The court erred in refusing to instruct the jury, as

requested by the defendant, "that railroad companies "are not required to use the latest or best appliances in "their business, or machinery that is absolutely safe, and "if the jury find from the evidence that the unblocked "frog is generally used, or even frequently used, by rail- "roads, then the use of the unblocked frog is not negli- "gence of the defendant, and the defendant is not liable "for an injury arising therefrom."

5. Error in denying motion for a new trial, in this, that the evidence in the case is insufficient to justify the verdict, and the same is against law in the following particulars, to wit: (*a*) it fails to show any fault or negligence on the part of defendant, (*b*) it shows contributory negligence on the part of the plaintiff's intestate, and (*c*) it shows that the deceased entered into the employ of the defendant some thirteen years prior to the accident, and continued in said employ during all said period, knowing the character of the frog used by defendant in its entire system, *and thereby accepted the risk thereof with his employment*.

BRIEF.

I.

The first proposition stated in brief for plaintiff in error (p. 5) is that "the deceased, on entering the employ of the "defendant, assumed, as one of the incidents of his em- "ployment, all dangers which might thereafter arise be- "cause of the use of unblocked frogs upon its road. In "other words, the maxim *volenti non fit injuria* is appli- "cable to the facts in this case."

This proposition is the one upon which plaintiff in error apparently chiefly relies, and it is, therefore, proper that we should, at the outset, enter upon an examination of the law and of the authorities bearing upon the ques-

tion of the liability of the defendant company to its employé under the facts and conditions as disclosed by the Record in the case at bar.

Our counter-proposition is that—

IT WAS NEGLIGENCE ON THE PART OF THE PLAINTIFF IN ERROR TO PROVIDE, IN THE CONSTRUCTION, SUCH A FROG; THAT THE DECEDENT DID NOT TAKE THE RISK OF INJURY BECAUSE THEREOF, AND, WAS NOT CHARGEABLE WITH NOTICE OF DANGER, NOR WITH NEGLIGENCE, IN MAKING THE COUPLING AT THE PLACE AND UNDER THE CIRCUMSTANCES, AS SHOWN IN THIS RECORD.

In the yard in which Seley was killed there were several tracks and switches (R., 10, 22); the train of which he was conductor had arrived at the town of Wells late, and some time had been lost in endeavoring to make the coupling (R., 23). One of the brakemen had failed to make the coupling once, and the other had failed twice (R., 11, 22, 59). Deceased then made an attempt to couple the cars, but failed, and, in making a second attempt, got his foot caught in the frog and was killed (R., 12–14, 59).

There is no evidence that plaintiff in error ever used blocked frogs on its road, but there is evidence that it used at that time a cast-iron frog, in which the space between the rails at the apex of the frog is filled with cast iron. In this frog a man's foot could not get caught (R., 57–8). It is also in evidence that the Union Pacific and some other railroads used blocked frogs, and that they have been used for at least ten or twelve years in this country (R., 27–31); that blocking the frog would make such an accident as the present one almost impossible (R., 16, 17, 28–30), and that it is more generally the custom to block frogs in yards (such as this, where the accident occurred) than on the main line (R., 30).

The deceased, Seley, had with him, at the time of the accident, one brakeman, who was either inefficient or incompetent, and who had made one unsuccessful at-

tempt to make the coupling, and another who had made two unsuccessful attempts to effect the same coupling; and the testimony in the case, both that offered by the plaintiff and that offered on behalf of the defend nt, conclusively shows that, under such conditions and circumstances, and the train being behind time, it was properly within the scope of the duty and employment of the conductor to make such an attempt to couple the cars (R., 34–40, 49, 50).

It is important here to note the difference between a *blocked* frog and a frog that is blocked. A blocked frog is one made of iron, and so constructed that the space is filled with iron; while a frog *blocked* is one in which there is no iron in the space, but that space is filed with wood—the object being the same in both cases, to prevent injuries by catching the foot between the rails; and on this road the blocked frog, that is, one in which the space is filled with iron, was used, and also the open frog which was not blocked, by inserting the wood, to prevent injury, as above.

This is mentioned here as throwing light not only upon the question under immediate consideration, but also upon the question of notice hereafter to be considered.

The court below, in passing upon this same question of the risks assumed by the deceased in entering the employ of the defendant, cites, with approval, the case of *Patterson* v. *Pittsburgh, etc., R. R. Co.*, (76 Pa. St., 389, 393).

In that case, the court, per Gordon, J., says:

"If the instrumentality by which he is required to perform his service is so *obviously* and *immediately* dangerous that a man of common prudence would refuse to use it, the master can not be held liable for the resulting damage. In such case, the law adjudges the servant guilty of concurrent negligence, and will refuse him that aid to which he otherwise would be entitled. But where the servant, in obedience to the requirement of the master, incurs the risk of machinery which, though dangerous,

is *not* so much so as to threaten *immediate* injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the rule is different. In such case, the master *is* liable for a resulting accident. The present case may be used as an example to illustrate what we mean. Let it be considered that the switch in question was dangerous; yet, doubtless, many trains had passed over it safely, and, hence, a man of common prudence might well conclude, that though it was more than ordinarily dangerous, yet many more trains might in like manner be passed over it safely. Under such a state of facts, the conductor might properly rest upon the judgment of his superiors, who requested him to continue its use, hoping that by extra care and skill he might avert accidents until the switch was reconstructed or properly repaired. On the other hand, if the defect was so great that obviously with the use of the utmost skill and care the danger was *imminent*, so much so that none but a reckless man would incur it, the employer would not be liable."

The same rule of law is thus stated in the case of *Conroy* v. *Vulcan Iron Works* (62 Mo., 35–39), opinion by Wagner, J.:

"Where the defect is so *glaring* that with the utmost care and skill the danger is still *imminent*, so that none but a reckless man would incur it, then if the servant will engage in the hazardous undertaking he must be consired as doing it at his peril. But if the defective machinery or appliances, though dangerous, are not of such a character that they may not be reasonably used by the exercise of skill and diligence, the servant does not assume the risk."

The rule in respect of the duty and liability of the master or employer must, of necessity, be governed by, and vary with, the circumstances and conditions of each particular case. It is a fact, of which the court will take judicial notice, that marked changes have been made, in respect of the operation of railroads, with the development of the country. The increased volume of business

and the greatly increased speed of trains, involving the necessity of promptness and expedition in the handling of freight trains, not only for the expedition of the transportation of freight, but expedition in order to keep them out of the way of passenger trains, must necessarily impose upon the railroad companies increased precautions for the safety of both passengers and employés; and a company that fails in this, fails in its duty to its employés.

And, in determining whether the company has failed in its duty in this regard, it must also be considered that the employé, in the matter of the coupling of cars, can not, in the very nature of the case, observe the conditions at his feet when he is engaged in coupling cars; and, in this case especially, it must be considered that this company used two kinds of frogs on its road—one that was safe, and the other in which there was liability that the foot might be caught; and we submit that it is most unreasonable to say that the employé should be chargeable with notice of the locations of those that were safe and those that were otherwise; and it is equally unreasonable to say that, when his duty calls him to couple cars, and when his attention must, of necessity, be directed to the act of coupling, he should scrutinize the track and see whether there was a frog there, and if so, whether it was of the dangerous or safe kind.

This is not like a case where an employé is operating a machine, where he may be fairly presumed, by reason of his constant association with that particular machine, that he knew its condition; but, on the contrary, is one where the employé, in the very nature of his employment, could only have casual observation of this part of the construction of the road; and it seems to us that it would be holding him to the very extreme of care to require him take notice of the condition of the frogs at every point along the defendant's road.

What are the *risks* that the employé takes with his employment? They are such risks as are *ordinarily* incident to that employment; such as, if coupling cars, where all the appliances for safe coupling are fully suitable, and such as diligence prescribes, the danger of having his hands or body crushed by the coming together of the cars; he has the right to assume that no trap has been set for his feet; and only in cases where to the most casual observation it would appear that there was danger, because of the conditions of the place, could he be held to negligence or chargeable with knowledge of the conditions which made the danger; and especially should this be so where some frogs were safe and others dangerous, since the circumstances are such that in the nature of things his attention could not be directed to the frog. The duty he was required to perform made it necessary for him to direct his attention otherwise than to the place where, in the performance of that duty, he was compelled to be.

Is it reasonable in such a case to charge the employé with notice of the condition? We submit it is not. Is it unreasonable to say that the railroad company should provide the necessary conditions of safety? We submit that it is not; for it is the duty of the company to provide appliances, in connection with its track, such as would make it as safe in the coupling of cars as extreme care, united with the highest skill, would render them.

It is a matter of common and universal knowledge, and one of which this court will take judicial notice, that this service, required of railroad employés, of coupling cars (which generally occurs at stations), is the one which is, above all others, and pre-eminently, dangerous—a service in which more lives are lost, or men disabled for life, than in any, perhaps we might say all, other services required of such employés.

It is because this is the supremely dangerous charac-

ter of this service that the law exacts from railroad companies the extremest care and diligence in making the appliances, facilities, and all other conditions affecting the safety of said service of coupling as safe as possible.

In other words, as in favor of such employés in their performance of this extremely dangerous service, the law exacts, as against the railroad companies, that same degree of care, skill, diligence, and attention as it exacts in favor of passengers on railroads, as laid down by this court in the case of *Pennsylvania Co.* v. *Roy* (102 U. S., 451, 455–6). On page 456 the court says:

"He" (the carrier) "is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise, upon his part, of extraordinary vigilance aided by the highest skill."

A convenient collection of the cases holding what we have just stated in favor of persons required to perform this most dangerous service will be found in the case of *Lawless* v. *Conn. R. R. Co.*, 136 Mass., 1:

THE EMPLOYER IS BOUND TO PROVIDE SUITABLE PHYSICAL MEANS AND AGENCIES FOR THE CONDUCT OF HIS BUSINESS. THE EMPLOYÉ DOES NOT TAKE THE HAZARD OF ANY NEGLIGENCE OF THE EMPLOYER IN THAT REGARD. THE EMPLOYÉ ONLY TAKES THE RISKS OF THE DANGERS WHICH ORDINARILY ATTEND, OR ARE INCIDENT TO, THE BUSINESS IN WHICH HE ENGAGES, AND WHICH CAN NOT BE AVOIDED BY EXTREME DILIGENCE AND THE HIGHEST SKILL, AND WHAT ARE THE ORDINARY RISKS DEPENDS UPON THE SPECIAL CIRCUMSTANCES OF THE PARTICULAR CASE.

This is, in substance, the opinion of this court in *Hough* v. *Railway Co.* (100 U. S., 216, 217), reaffirmed in *Railway* v. *McDaniels* (107 U. S., 459).

While it is true, as a general proposition or statement of law, that the employé assumes the risks *ordinarily* incident to his employment, yet, it is also true, as we have seen above, that the employer is bound to provide and maintain suitable appliances and apparatus with which to carry on its business, and by the use of which it can render the employment reasonably free from danger.

In other words, since it appears from the Record in the case at bar, that, by the adoption of blocked frogs, or by the placing of wooden blocks in the frogs used by the defendant company herein, it would have been almost impossible for the accident, by which Seley was killed, to have happened; and, since it further appears that the system of blocked frogs had been in use for a number of years and by various railroads, and especially in use by railroads in and about the "yards" where switching is done, as in the case at bar, and that by the use of these blocks or blocked frogs it would have been almost impossible for a conductor or brakeman so engaged in switching and coupling cars to have caught his foot in a frog, then it was the duty of the defendant company to have adopted and used said blocks or blocked frogs as would have rendered said employment *reasonably* free from danger.

The safety block has been in use for many years, and is a simple device for the protection of employés engaged in a very hazardous employment. By what has been above stated, we do not mean to insist, nor, indeed, is it necessary for the purposes of the point now under consideration to insist, that an employer is bound to adopt the latest improvements or instrumentalities. What we do insist upon, however, is that, where experience has demonstrated that the lives of employés engaged in dangerous employment may be preserved, and their employment rendered less hazardous by the adoption and use

of a device such as the blocked frog, in such case it is the duty of the railroad company, certainly in such a place as a yard where switching is done, to provide and maintain such safeguards.

This principle is well stated in the decision of the court below, as follows:

"While a railway company is not required to experiment with novel inventions alleged to be safer and more suitable, yet when experience has demonstrated that their use does remove hazard and preserves the lives of their employés engaged in dangerous employments, prudence as well as humanity demands that such new agencies shall be used. Such companies have no right to continue to employ such dangerous and destructive agencies as wound and kill their employés when safer and better ones are in use. We are of the opinion that the appellant is guilty of negligence in using the open frog." (R., 82.)

This duty on the part of employers to adopt and provide suitable means and instrumentalities for the reasonable and proper protection of their employés has been recognized repeatedly in very many cases, and it is assumed that no extended citation of authorities is necessary in support of our present position.

The case of Snow *v.* Housatonic Railroad Co. (8 Allen, 446) expressly recognizes this duty of employers, and states:

"The legal implication is, that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and oversight; and if he fails to do so, he is guilty of a breach of duty under his contract, for the consequences of which he ought in justice and sound reason to be held responsible."

The same principle is recognized and enforced in the case of Cayzer *v.* Taylor (10 Gray, 274, 282). See also Seaver *v.* Boston, etc., R. R. (14 Gray, 466).

So, also, in the case of the Barton-hill Coal Company *v.* Reid, 3 Macq. H. L. Cas., 266, where Lord Cranworth observed that many cases have established this principle: "That where a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant from *unnecessary* risk."

This same question has also been passed upon by this court, and the obligation imposed upon the employer, in this regard, is laid down substantially as above quoted. In the case of Hough *v.* Railway (100 U. S., 213–217) the court in its opinion, by Mr. Justice Harlan, states the rule thus:

"One, and perhaps the most important, of those exceptions arises from the obligations of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. * * * It is implied * * * that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities, provided by the master, has, ordinarily, no connection with their purchase in the first instance, or with their preservation or maintenance, in suitable condition, after they have been supplied by the master."

See, also, the case of *Railroad Company* v. *McDade* (135 U. S., 574–5).

It is said, by this court, in *Hough* v. *Railway Co.* (*supra*), that "the difficulty has been in its [the] practical appli-"cation to special circumstances of particular cases." And, in considering any reported case, it is, therefore, necessary to look at its special circumstances; and this is illustrated by reference to the case of *Appel* v. *R. R. Co.* (111 N. Y., 550), cited in brief of plaintiff in error (p. 13), where it appears that the injured party was a *switchman* in the yard where the injury occurred, and, from which fact, the court says that he was acquainted with the means employed, part of which was the unblocked frog.

We do not concede that the court had the right to say what the injured party must have known; that was a question of *fact* for the jury; but that case is very different from the one now at bar, because of the fact that the injured party was a switchman, and his place of employment was there in the yard, where he was injured, and it might reasonably be inferred that he knew of the conditions and the means employed by the company. Whereas, in a case such as the one at bar, it might not be reasonably presumed or inferred that decedent had such knowledge as would impose upon him the risks incident to the means provided. To this we will recur in another connection.

Contributory Negligence.

In connection with the rule of law which has just been discussed, it is proper that we should consider the further objection urged on behalf of the appellant, to wit, that the negligence of the deceased caused or contributed to his death, and that, therefore, the defendant is not liable.

The question of contributory negligence here referred to is one properly arising in connection with the rule of law which has just been under discussion, in regard to

the servant assuming the *ordinary* risks incident to his employment.

In the case of Snow *v.* Housatonic Railroad Co. (8 Allen, 441–4) it is stated, in the opinion of the court:

"Now, while it is true, on the one hand, that a workman or servant, on entering into an employment, by implication agrees that he will undertake the *ordinary* risks incident to the service in which he is to be engaged, among which is the negligence of other servants employed in similar services by the same master, it is, also, true, on the other hand, that the employer or master impliedly contracts that he will * * * take due precaution to *adopt and use* such machinery, apparatus, tools, appliances and means as are suitable and proper for the prosecution of the business in which his servants are engaged, with a reasonable degree of safety to life and security against injury * * * The proprietors of a railroad would be responsible for accidents happening by tracks improperly laid, or switches which were not constructed to operate with regularity and precision. The distinction on which this rule of law is founded is an eminently just and reasonable one. It is this: A workman or servant, on entering upon any employment, is supposed to know and to assume the risks naturally incident thereto. * * * It is certainly most just and reasonable that consequences which the servant or workman must have foreseen on enteringi nto an employment, and which due care on the part of the employer or master would in no way prevent, should not be visited on the latter. But it is otherwise where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of a work. The use of these they could not foresee. The legal implication is that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and oversight; and if he fails to do so, he is guilty of a breach of duty under his contract, for the consequences of which he ought in just and sound reason to be responsible. Such we understand to be the rule of law, and the principles on which it is founded, as now fully established by authorities."

Aside from the question of the servant assuming the ordinary risks of his employment, and the question of contributory negligence, in connection therewith, it is further insisted by the plaintiff in error in its brief (at page 24) that the deceased was guilty of an *affirmative* act of contributory negligence in this, that, shortly prior to the accident complained of, decedent, in attempting to make the coupling of the train with the car the first time, had placed his foot in a frog, and that he was then warned by the brakeman, Hardy, "For God's sake, Seley, get your foot out of the frog, or you will get ketched!" and that he took it out and stepped outside of the track; and that, therefore, having been thus warned, he knew of the presence of the frog when he went upon the track the second time.

The first reply that we desire to make to this objection is that the defendant assumes as a fact that the decedent caught his foot the second time in the identical frog in which he placed his foot the first time. We have heretofore stated that there is some uncertainty or indefiniteness in the Record as to the exact fact in this regard. As above pointed out, however, we assert that the inference to be fairly deduced from the testimony in the case is that the decedent, Seley, caught his foot in one of the frogs of the second set of frogs, about fifteen or twenty feet distant from the first frog, and which first frog was the one in which he had placed his foot in attempting to make the coupling of the cars the first time, and that he was not warned, nor is he shown to have had any knowledge of the existence of the frog or frogs at the particular point or place at which he attempted to make the coupling at the time he was killed.

It is to be observed that the evidence does not show that he *caught* his foot the first time, but that he *placed* his foot in the frog, which is equivalent to saying that

he had his foot within the angle made between the prongs or projection of the frog (R., pp. 19, 20).

It is, further, insisted on behalf of the defendant that the decedent, Seley, inasmuch as he had been in the employ of the defendant company for some years, and had made frequent trips through said town of Wells, must have known of the existence and location of said frogs, and of the further fact that said frogs were not blocked.

Under the facts and circumstances disclosed by the Record herein, the decedent, Seley, at the time, acting as a diligent and faithful freight conductor, and attempting to get the said car coupled to his train, and to get his train through on time, and, at the time of the attempted coupling, having his attention directed to the coupling itself, can it be fairly contended that he was guilty of negligence in getting his foot thus caught in an unblocked frog, even assuming that his attention had been called to its dangerous character but a short time prior to the accident?

In the case of Hannah *v.* Railroad (154 Mass., 529–33), a brakeman, employed in a railroad freight-yard, while uncoupling the cars, stepped in a hole in the road-bed under a switch rod, and was caught and injured, the train passing over his leg. In that case, it was insisted that the act of the brakeman in so walking in the road-bed between the moving cars, one in front and one behind him, was, in itself, an act of negligence, and would prevent a recovery by him.

The court, in its opinion, says:

"Even if the plaintiff had known of the existence of the hole—(and there was a conflict of evidence on the question of such knowledge)—" it was not conclusive evidence of a want of due care on his part for him to get into it, if that happened while he was in the discharge of his duty and while his attention was directed to the work in which he was engaged."

In the case of Snow *v.* Housatonic Railroad Co. (8 Allen, 446–447), the court says:

"The existence of such a defect as the evidence disclosed at the trial, being of a nature to obstruct the plaintiff in passing safely and rapidly over and between the tracks, and to hinder him in the performance of the service in which he was engaged, tended very strongly to show that the defendants had permitted a breach of the implied obligation which rested upon them to provide a suitable place in which the plaintiff could perform his duties safely, in the exercise of due and reasonable care, and without incurring a risk which did not come within the scope of his employment. The omission of the defendants was analogous to a failure on their part to have and maintain safe and suitable tracks, switches, or turnouts, or to construct and keep in repair staunch and sufficient bridges. For such failure or omission they would be clearly liable in damages to a person in their employment who might be injured thereby, according to the principles already referred to."

So, also, in the case of *Kane v. Railway Co.* (128 U. S., 91), which was an action to recover damages in consequence of an injury to a brakeman from a missing step which he knew was gone, but failed to think of at the time of the injury. In that case, this court said:

"We are of opinion that the court erred in not submitting to the jury to determine whether the plaintiff, in forgetting, or not recalling, at the precise moment, that fact that the car from which he intended to let himself down was the one from which a step was missing, was in the exercise of the degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling, and under circumstances in which he was placed. If he was, then he was not guilty of contributory negligence that would defeat his right of recovery."

See, also, cases cited in the opinion of the court below, in this case (*R. 85, fol. 167*).

"WHERE, IN AN ACTION AGAINST A COMMON CARRIER TO RECOVER DAMAGES FOR INJURIES, THERE IS UNCERTAINTY AS TO THE EXISTENCE OF EITHER NEGLIGENCE OR CONTRIBUTORY NEGLIGENCE, THE QUESTION IS NOT ONE OF LAW, BUT OF FACT, AND TO BE SETTLED BY A JURY; AND THIS WHETHER THE UNCERTAINTY ARISES FROM A CONFLICT IN THE TESTIMONY, OR BECAUSE THE FACTS BEING UNDISPUTED, FAIR-MINDED MEN WILL HONESTLY DRAW DIFFERENT CONCLUSIONS FROM THEM."

This is quoted from the opinion of the court in *Richmond and Danville Railroad* v. *Powers* (149 U. S., pp. 44–45.)

See also Washington & Georgetown Railroad Co. *v.* McDade (135 U. S., 554); Hough *v.* Railway Co. (100 U. S., 213); Delaware, &c., Ry. Co. *v.* Converse (139 U. S., 469); Railroad Co. *v.* Stout (17 Wall., 657; 2 Thomp. on Neg., p. 1011, cases cited in notes 5–6; *Id.*, p. 966; also, Gates *v.* Pa. R. R. Co., 154 Pa. St., 566.

The question of negligence is one of fact, in all such cases, to be submitted to the jury, if there is *any* evidence reasonably tending to show negligence on the part of the defendant, or want of negligence on the part of the injured party.

In 2d Thompson on Negligence (in the notes at bottom of page 1178), the rule as to when contributory negligence is a question for the jury, is thus stated:

"Whether there has been contributory negligence on the part of the plaintiff is a question for the jury, under the same circumstances and subject to the same limitations as the question whether there has been negligence on the part of the defendant."

To this the author cites (in note 9)—

Jalie *v.* Cardinal, 35 Wis., 118, 129;
Seigle *v.* Eisen, 41 Cal., 109;
Park *v.* O'Brien, 23 Conn., 339;
R. R. *v.* Brady, 17 Kan., 380;
Brown *v.* R. R., 58 Me., 384;
Express Co. *v.* Nichols, 32 N. J. L., 165.

When it is that negligence becomes a matter of law not referable to the jury, and which the court must dispose of, is well illustrated in many of the cases above cited, and will be found in the case of *Sullivan* v. *New York, etc., R. R.* (154 Mass., 528); *R. R.* v. *McDade* (135 U. S., 555); and will be found to be as stated in the following from the case of *R. and D. R. R.* v. *Powers* (149 U. S., 45), where this court says:

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them. (R. R. Co. *v.* Stout, 17 Wall., 657; R. R. Co. *v.* McDade, 135 U. S., 554; R. R. *v.* Converse, 139 U. S., 469.")

See. also. Dunlap v. R.R.Co. 130 U. S. 649. 52, and cases cited.

From this authority, it conclusively results that the verdict below conclusively settles against the plaintiff in error all questions of negligence on the part of the plaintiff in error, such as the failure to block the frog, or to adopt and use *blocked* frogs, and the questions of contributory negligence on the part of the defendant in error, such as continuing in the service of plaintiff in error with knowledge of the condition of the frogs in getting his foot in the frog after warning; unless it can be predicated of the testimony in the Record, bearing on these respective questions of negilence, and of contributory negligence, that they, or one or more of them, are so conclusively settled by such testimony, in favor of the plaintiff in error, that there is no uncertainty whatever as to the fact that plaintiff in error was not negligent, nor as to the fact that defendant in error was negligent.

Or, stating this point in the words of the court in *Sullivan* v. *R. R.* (154 Mass., 524–27–28), the court is no

permitted to take from the jury these questions of negligence, and to decide them for the jury, and for the case, unless the evidence shows that the negligence of the defendant in error was gross and willful. If it was less than that, then the questions of negligence were for the jury, and are all settled in favor of defendant in error by the verdict.

It is, we submit, impossible fairly to contend, in the present case, that that any of the alleged contributory negligence of the defendant in error was of this kind.

Therefore, the verdict has settled in favor of the defendant in error both the question of the negligence of plaintiff in error, and the absence of contributory negligence on the part of the defendant in error.

In this case it can not be conclusively presumed that the defendant knew the dangerous character of these frogs. The most that can be said of it is that the inference may be drawn that he did know it from the length of his service on the road as an employé; and yet, from the nature of that service, reasonable men might also infer that in discharging his duties he would not observe matters that appertained wholly to the construction of the road; that his attention was directed to the movement of his train. Reasonable men might conclude that he had not such knowledge of the conditions at this place as to charge him with neglect, and especially under the circumstances, where there was difficulty in making this particular coupling, three efforts having been made by brakemen and one by himself before this injury occurred, and that it was not negligence for him in his effort to make this coupling under such circumstances to fail to observe this particular frog, which happened to be at the very place where this duty necessarily was performed. It was, therefore, pre-eminently a case to be submitted to the jury, and the finding of the

jury on that subject under the authorities above alluded to will not be reviewed by the court.

This was submitted to the jury by the trial court in the following language (R., p. 69):

"It is a principle of law that if a person be injured, no matter what the carelessness of the party injuring him may be, if he has himself contributed to that by his own carelessness or heedlessness, then he can not recover. The law will not permit him to apportion the responsibility under such circumstances, but will simply say that the party thus injured must bear the responsibility. In this case, if you find that the deceased recklessly or heedlessly met with this accident, and that he contributed to it, that will end this case in favor of the defendant, and you should return a verdict in its favor. It is the duty of the employé, or of any person, to use all their faculties and all their senses to avoid danger. It was the duty of this employé to make use of all the facilities that he had to see what danger he was about to encounter. He should use all the knowledge he had as to the way this road was constructed, what the instrumentalities were with which he was doing business, and you should consider all these things in determining whether this man contributed—himself—to the injuries. You should also consider the fact as to what he was engaged in at the time; how much that would engage his attention, and from all these things—taking into consideration all the circumstances of the case—was he rash, and was it careless and heedless on the part of this man to undertake to do what he was doing at the time; if so, this case should end in favor of the defendant."

The court also instructed the jury in the following language (R., p. 71):

"But, in addition to his knowing that it was defectively constructed, he must know and appreciate and understand its dangerous character and the danger it threatens to him; he must know and understand that before he can be charged with contributory negligence in staying with the company after understanding that. You must remember that it is negligence that is being

claimed on the part of the deceased now, and negligence in this sense means just what it does when you are considering it in relation to the defendant. It is want of proper care, just as I explained it to you before. Negligence is the absence of care according to the circumstances. Now, if this man knew about the construction of that railroad, and if he knew the dangerous character of it and how liable it was to hurt him, and he continued in that employment, then he can not recover because that was negligence for him to stay with the company that used defective appliances. But, while the appliance was defective, if it was not so plainly defective and so plainly threatening to his safety and the safety of the other employés, and he did not believe and could not have known, and did not know but that he might still perform his duties without injury; if a reasonable man might have come to that conclusion, then it would not be contributory negligence in him to remain with it. You should determine this principle of contributory negligence from this basis, and determine whether that man was guilty of contributory negligence, and whether, as a matter of fact, he assumed the risk of the defective construction, and, if so, that would be a bar to recovery on the principle I have just explained; if you find him guilty of contributory negligence under that principle, no matter that you may have found all these other questions in favor of the plaintiff; no matter how negligent the defendant may have been in the defective construction of their road, you should end this case by returning a verdict in favor of the defendant."

And, on the request of the defendant, the court instructed the jury (as appears, R. p. 72), as follows:

"The jury are instructed that the law does not require employers to adopt the latest improvements, nor does the relation of employé and employer involve a guaranty by the employer of the employé's safety when the employé works with machinery insufficient, or for any reason unsafe, with their knowledge, or means of knowledge, of its condition, and knew or might have known of the danger of the employment to himself, then he takes the risk in-

cident to the employment in which he was then engaged, and can not maintain an action for injuries sustained arising out of the accidents resulting from such defective condition of the machinery. If, therefore, you believe *in* the evidence that Conductor Seley, from his long employment on the road of the defendant, had knowledge of the construction and use of the frog where he was killed, and of the danger incident to the use thereof to himself, and made no objection thereto, but continued in the employment of the defendant in full knowledge there, and by reason of such defection he lost his life, you will find for the defendant."

From the foregoing quotations from the charge of the court, it will be seen that the defendant recognized the proposition that we are here submitting, to wit, that there is no conclusive implication of knowledge of the conditions or of negligence arising out of the fact that the deceased had long been in the service of the defendant, on its road. It was only evidence tending to prove, not conclusively proving, that the defendant had knowledge of the conditions, and was only evidence tending to prove, and not conclusively proving, that he was guilty of negligence; and, such being the fact, the court fairly submitted to the jury the question involving his knowledge and his negligence. Whether he had knowledge, or was negligent, was a question of fact to be determined by the jury. This verdict finds that negligence was not attributable to him.

The brief of the plaintiff in error has omitted to consider those assignments of error which relate to the instructions refused by the court, and we, therefore, infer that they are no longer relied on.

It will be readily seen that these well might be abandoned, as they have been, because these instructions, so refused, in so far as they were good law, were, in fact, given by the court, and the court was not obliged to repeat them.

The other instructions asked for and not given were misleading, or else erroneous, and were, therefore, properly refused.

Hence we, like counsel for the plaintiff in error, omit to discuss these questions, stated in the assignment of error.

We respectfully submit that this judgment must be affirmed.

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Of Counsel for Defendant in Error.